103

S. Hrg. 103–826

VETERANS' REEMPLOYMENT RIGHTS LEGISLATION: S. 843, THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1993

Y 4. V 64/4: S. HRG. 103-826

Veterans' Reemployment Rights Legis...

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

MAY 13, 1993

Printed for the use of the Committee on Veterans' Affairs

JAN 4 1995

U.S. GOVERNMENT PRINTING OFFICE

83–460 CC WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-046177-4

103

S. Hrg. 103–826

VETERANS' REEMPLOYMENT RIGHTS LEGISLATION: S. 843, THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1993

Y 4. V 64/4: S. HRG. 103-826

Veterans' Reemployment Rights Legis...

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

MAY 13, 1993

Printed for the use of the Committee on Veterans' Affairs

JAN 4 1995

U.S. GOVERNMENT PRINTING OFFICE

83–460 CC WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-046177-4

COMMITTEE ON VETERANS' AFFAIRS

JOHN D. ROCKEFELLER IV, West Virginia, *Chairman*

DENNIS DeCONCINI, Arizona
GEORGE J. MITCHELL, Maine
BOB GRAHAM, Florida
DANIEL K. AKAKA, Hawaii
THOMAS A. DASCHLE, South Dakota
BEN NIGHTHORSE CAMPBELL, Colorado

FRANK H. MURKOWSKI, Alaska
STROM THURMOND, South Carolina
ALAN K. SIMPSON, Wyoming
ARLEN SPECTER, Pennsylvania
JAMES M. JEFFORDS, Vermont

JIM GOTTLIEB, *Chief Counsel / Staff Director*
JOHN H. MOSEMAN, *Minority Staff Director / Chief Counsel*

CONTENTS

MAY 13, 1993

Page

Veterans' Reemployment Rights Legislation: S. 843, the Uniformed Services Employment and Reemployment Rights Act of 1993 1

STATEMENTS BY COMMITTEE MEMBERS

Chairman John D. Rockefeller IV 36
Senator Frank H. Murkowski 37
Senator Strom Thurmond 37

WITNESSES

Brinck, Michael, National Legislative Director, AMVETS 22
Prepared statement of Mr. Brinck 68
Ensslin, Jr., Maj. Gen. Robert F., Executive Director, National Guard Association of the United States 28
Prepared statement of General Ensslin 87
Gilmer, Lennox E., Associate National Employment Director, Disabled American Veterans 24
Prepared statement of Mr. Gilmer 71
Gribbin, D.J., Legislative Representative, National Federation of Independent Business 7
Prepared statement of Mr. Gribbin 61
Hubbard, James B., Director, National Economic Commission, The American Legion 26
Prepared statement of Mr. Hubbard 75
Manhan, Bob, Assistant Director, National Legislative Service, Veterans of Foreign Wars of the United States 27
Prepared statement of Mr. Manhan 82
Mazo, Judith F., Senior Vice President, The Segal Company, representing the Association of Private Pension and Welfare Plans, accompanied by Lynn Dudley, Director of Retirement Policy 5
Prepared statement of Ms. Mazo 52
Puente-Duany, Hary, Director, Office of Veterans' Employment, Reemployment, and Training, U.S. Department of Labor, accompanied by Susan M. Webman, Counsel, Office of the Solicitor 4
Prepared statement of Mr. Puente-Duany 41
Rodenberg, Lt. Col. James, Legislative Counsel, Reserve Officers Association 29
Prepared statement of Colonel Rodenberg 92
Rush, Jr., Francis M., Principal Director, Management and Personnel, Office of the Assistant Secretary of Defense for Reserve Affairs, U.S. Department of Defense 3
Prepared statement of Mr. Rush 37

APPENDIX

Prepared statements of Committee members 36
Prepared statements of witnesses 37
Statements:
Air Force Sergeants Association 96
Association of the United States Army 98
Central Intelligence Agency 102
Enlisted Association of the National Guard of the United States (EANGUS) 106
ERISA Industry Committee 112
Federal Retirement Thrift Investment Board 120
Labor Policy Association 123
National Coordinating Committee for Multiemployer Plans 128
Non Commissioned Officers Association of the United States of America 135
Office of Personnel Management 139
U.S. Department of Justice 142
U.S. Department of the Treasury 147
U.S. Merit Systems Protection Board 150
U.S. Office of Special Counsel 154
Vietnam Veterans of America 158
Written responses and additional information from:
Department of Labor 164
The American Legion 169

VETERANS' REEMPLOYMENT RIGHTS LEGISLATION: S. 843, THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1993

THURSDAY, MAY 13, 1993

U.S. SENATE
COMMITTEE ON VETERANS' AFFAIRS
Washington, D.C.

The Committee met, pursuant to notice, at 10:10 a.m. in room SR–418, Russell Senate Office Building, Hon. Frank Murkowski (acting chairman of the Committee) presiding.

Present: Senators Murkowski, Akaka, Graham, and Specter.

Also present (staff): Jim Gottlieb, chief counsel/staff director; Charles F. Lee, counsel; and John Moseman, minority staff director/chief counsel.

Senator MURKOWSKI. Good morning. I want to call the hearing to order. Unfortunately, Senator Rockefeller has been detained as a consequence of a tree that came down in the storm last night and hit his wife, Sharon. She was in her vehicle. Mrs. Rockefeller is in the hospital and I trust that her recovery is coming along well and that her condition is not serious. Nevertheless, it is a traumatic experience. As a consequence, I will chair the hearing this morning as ranking minority member.

Unfortunately, I have another hearing that begins at 10 a.m., so very soon after my opening statement, I will ask, so long as there is no objection, that our majority and minority counsels proceed until other members of the Committee arrive.

So, with that disclosure statement, let me welcome the witnesses. As a courtesy to our absent Chairman, I will proceed by reading Senator Rockefeller's prepared opening statement. I request that my own opening statement also be included in the hearing record.

CHAIRMAN'S OPENING STATEMENT

The men and women who serve their country in the military face not only the risk of conflict, but often have major disruptions in their personal lives back home. One small protection that we've provided to those who serve, and have afforded their brothers and sisters in varying degrees since the 1940's, is the right to return to their old jobs in the private sector in pretty much the same capacity as when they left to serve their country. We have an obligation to ensure that

employment will continue upon the veteran's return. That is the least we can do.

Over the years, those job protections have evolved into a patchwork of policies known as veterans' reemployment rights, or VRR. There is now widespread agreement that the hodgepodge of veterans' reemployment rights laws, regulations, and interpretations need to be updated and recodified, and that is why we're here this morning.

On April 29, the Chairman and I were joined by Senators DeConcini, Graham, Akaka, Daschle, and Campbell in introducing S. 843, the Uniformed Services Employment and Reemployment Rights Act of 1993. Both the Senate and House passed similar bills last year, and the House passed a similar bill, H.R. 995, just last week. The House and Senate bills would both clarify and make improvements in existing VRR law.

Generally, the VRR law entitles individuals who serve in the military to return to their former civilian jobs without loss of seniority, status, or pay. The law is intended to remove barriers to noncareer military service by providing job security to employees who leave their civilian jobs to enter active duty voluntarily or involuntarily. Both the House bill and our bill would help ensure that the VRR law effectively and fairly serves this purpose.

Six years ago the administration, recognizing the need to revise the law, organized an interagency task force and spent 3 years—imagine that, 3 years—developing what was to be the forerunner of S. 843. I hope they didn't work full time. [Laughter.] Two agencies which participated in that task force, the Departments of Labor and Defense, are represented on our first panel today. I find this process incredible but, nevertheless, I am still a little naive about process.

In the 102nd Congress, both the House and Senate passed separate VRR bills derived from the task force proposal. However, there was not enough time to negotiate a conference compromise with the House on the complicated issues of VRR before the 102nd Congress adjourned, so we revisit these issues today.

Two of the business organizations with which our Committee worked in a strong bipartisan effort last year to craft an acceptable bill are also on today's first panel. Together with the Federal administrators, they will identify the primary issues and discuss the areas of conflict and hopefully enlighten us on why we can't seem to move on this process when it has been through the wringer at least a couple of times.

Our second panel will represent the employee/servicemember. The panel is comprised of representatives from veterans service organizations, the Reserves, the National Guard, and so forth.

We are pleased to have our panelists with us today and look forward to hearing their testimony. We have statements that will be entered in the record from Senator Rockefeller, Senator Thurmond, and myself.

[The prepared statement of Chairman Rockefeller appears on page 36.]

[The prepared statement of Senator Thurmond appears on page 37.]

[The prepared statement of Senator Murkowski appears on page 37.]

Senator MURKOWSKI. Unless you have some preference, we will take volunteers to go first. Or if you like, we can go in the order of the witness list. Mr. Rush, you reached for the microphone, and that's good enough for me.

STATEMENT OF FRANCIS M. RUSH, JR., PRINCIPAL DIRECTOR, MANAGEMENT AND PERSONNEL, OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS, U.S. DEPARTMENT OF DEFENSE

Mr. RUSH. Thank you, Mr. Chairman. I am pleased to be here this morning to represent the Department of Defense. The statutory provisions which you mentioned are of immense importance to the Department of Defense.

Where ambiguities in current law exist, they have potentially serious consequences with respect to the rights that are provided by this statute. Therefore, that interagency committee that you referred to was formed in 1987. So it has been 5 or 6 years in the making. However, during that period, much thought and effort on the part of this Committee, the House Committee on Veterans' Affairs, and the agencies of the executive branch have gone into improving this legislation to the point where now we have H.R. 995 and S. 843, which are in substantial part the same. They both would improve the clarity of the administration proposal which was submitted in March 1991 and of the current law. The Department of Defense greatly appreciates the continuing dedication of this Committee, Mr. Chairman, in improving this legislation and moving it forward.

While my position in the Office of the Secretary of Defense is in Reserve Affairs, I would like to stress that this legislation is important to the total force, the active, the National Guard, and the Reserves. We are now in the 20th anniversary year of the All Volunteer Force and, as you know, Mr. Chairman, the All Volunteer Force has been a great success. With the end of the Cold War and with the downsizing of the active and Reserve forces, we must maintain the quality in the active, Guard, and Reserve forces that we have achieved in the All Volunteer Force era.

The law that you are considering this morning provides essential support and this objective by encouraging, as a purpose, noncareer uniformed service by eliminating and minimizing the disadvantages to civilian careers in employment which occur as a result of that service.

In summary, Mr. Chairman, we believe that S. 843 is consistent with the objectives which the interagency committee had in mind nearly 6 years ago. The Department of Defense is convinced that the provisions of this legislation will make clearer and more workable the important protections provided by the statute for those citizen-soldiers, sailors, marines, airmen, and Coast Guardsmen who will continue to be a critically important part of the total All Volunteer Force.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Rush appears on page 38.]

Senator MURKOWSKI. Thank you very much, Mr. Rush.

I am going to ask that the entire panel go through their statements and then Jim Gottlieb and John Moseman for the majority and minority will proceed. Is that satisfactory, gentlemen? You are going to have to excuse me.

Mr. Duany.

STATEMENT OF HARY PUENTE-DUANY, DIRECTOR, OFFICE OF VETERANS' EMPLOYMENT, REEMPLOYMENT, AND TRAINING, U.S. DEPARTMENT OF LABOR, ACCOMPANIED BY SUSAN M. WEBMAN, COUNSEL, OFFICE OF THE SOLICITOR

Mr. DUANY. Thank you. In the interest of time, I will submit my testimony for the record and will give an abbreviated version that has less detail.

Mr. Chairman and distinguished members, thank you for the opportunity to present testimony on S. 843, the Uniformed Services Employment and Reemployment Rights Act of 1993. First and foremost, I hope Mrs. Rockefeller is doing well. We are sad to see that she suffered an accident last night.

We support the Committee's effort and recognize your commitment towards strengthening the veterans' reemployment rights program through this bill. During my testimony, I will make reference to the House bill and discuss certain provisions of both bills.

The citizen-soldier is an American tradition. Throughout our history, Americans have left their civilian pursuits to defend the Nation and the principles of liberty and justice we cherish. Veterans of many wars and armed conflicts attest to this tradition. Another group of citizen-soldiers demands attention as well. Whether at Kuwait or Somalia, the men and women of the Reserve and National Guard are there in support of military operations under the Total Force concept. Recent developments both here and abroad indicate that reliance on these citizen-soldiers would not be diminished or cease in the near future.

Also, citizen-soldiers Reservists and Guard members have been instrumental in the relief efforts following Hurricane Andrew, the protection of life and property during riots in Los Angeles, the war on drugs, and the relief airlifts to Bosnia.

Not since our Nation's founding have we been so dependent on the citizen-soldier. Under the Total Force concept, our country relies not only on the patriotism of volunteers, but also on the readiness of the Reserve components to maintain their required defense posture. An essential element of readiness is participation in the training necessary to maintain and enhance military skills. Reserve component personnel are unlikely to be willing to participate in such training or continue their service in the Reserve components unless they can be offered reasonable assurances that they will not suffer harm with respect to their civilian jobs and careers and their families. For this reason, the effective enforcement of reemployment rights is more important than ever before.

Since 1940, the Veterans' Reemployment Rights Act has protected employees who leave civilian jobs for military service. A cornerstone

of the VRR law has been the escalator principle. It provides that upon completion of a person's military service, whether voluntary or involuntary, such person is entitled to return to their previous civilian job or a similar job with their preservice employer with the precise seniority, status, and rate of pay he or she would have attained had they remained continuously employed. In other words, the basic principle has been that the veteran returning does not get harmed in any way. The philosophy behind this is simple and straightforward. Those who serve our Nation have earned the right to return to their civilian positions without penalty, delay, or harm.

Mr. Chairman, we are pleased that the Committee has proposed legislation that simplifies and clarifies the VRR law while retaining and continuing the basic focus and rights of the current law. At this time, the Department strongly supports the enactment of most of the provisions contained in S. 843. However, we are still reviewing the pension-related provisions of the bill which raise serious issues that have not been fully assessed. In addition, although we generally support the concept of maximum health insurance coverage for employees, we defer our views on the health care provisions until the work of the Health Care Reform Task Force has been completed and the administration has submitted its proposals to the Congress.

The House and Senate bills are similar but have some significant differences. As I summarize some of the key differences, it is important to point out that we feel it is crucial to ensure that the new legislation does not harm servicemembers by loss of protection enjoyed under current VRR law. We also feel it important to ensure that employers are not burdened with unaffordable requirements. In this regard, we support the continuation of providing benefits only to other than temporary employees, as discussed in the attached position paper.

Also, we seek universality of coverage. There has never been a time when any group was intentionally left unprotected with respect to civilian employment. Based on this, we also support the concept that American companies overseas be covered under this bill as well as the Merchant Mariners and NOAA [National Oceanic and Atmospheric Administration] commissioned corps as individuals and Native American tribes as employers. We have attached position papers to our full testimony indicating why we feel these are important.

Noticing that the yellow light is on, I will stop at this point and thank you again. I am accompanied by Ms. Susan M. Webman who is a counsel for the Office of the Solicitor, U.S. Department of Labor. We will be glad to answer any questions when the time comes.

[The prepared statement of Mr. Puente-Duany appears on page 41.]

Mr. GOTTLIEB [assuming chair]. Thank you.

Ms. Mazo.

STATEMENT OF JUDITH F. MAZO, SENIOR VICE PRESIDENT, THE SEGAL COMPANY, REPRESENTING THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, ACCOMPANIED BY LYNN DUDLEY, DIRECTOR OF RETIREMENT POLICY

Ms. MAZO. Thank you. I am going to address the absent Chairman as well as the rest of you and say how pleased the Association of Private Pension and Welfare Plans is to be here. We have been very involved in these issues for several years, particularly on behalf of large employers primarily, although our membership base does include small employers. We worked very closely with the staff of the Committee who have been extremely helpful and very receptive, and I particularly want to compliment Chuck Lee, who has really shown a dedication and shared our dedication, I think, to making this bill workable. We all need the clarifications that the bill achieves.

Our members are generally very supportive of the bill's goals. What we are concerned with is smoothing off some rough edges to make sure that, in fact, we can administer the protections that these people clearly merit in a way that is not overridden with red tape and that is fair to both the employees and the employers.

We have attached to our statement a list of technical points. We think they are important. I'm not going to go through them today, but they are all on fairly small points where we think minor adjustments, which often don't have to be in the bill—many of these issues, if they are simply addressed in legislative history, would enable employers to have a clear-cut basis for taking what I think we might all agree is a fairly reasonable interpretation of some of the matters. So I would address your attention to that at your leisure, as we say.

There are three points that I want to make. We discussed making this a sandwich. There are two points where the Senate bill is outstanding in addressing serious employer concerns and the House bill is not. If this Committee were to adopt the House bill rather than continuing with positions it has taken, unfortunately the employer community would have to oppose the bill, and we really don't want to do that. In fact, we really want the clarification and the clarity.

So, instead of making it a sandwich and make it clear, I think I will start with the one important thing in your bill that we would like to see modified in some ways to make it much more workable for employers. That relates to the conditions under which employees on military leave must get all of the best benefits that are offered to anybody who was on any other kind of leave from that particular employer.

The other two items which are of profound importance are also matters that were addressed in the Treasury statement: the need to accommodate Internal Revenue Code restrictions on what employers can do with their benefit plans, and the need to make sure the bill is affordable by not requiring employers to contribute amounts that otherwise the market would have generated for absent employees.

On the question of comparable leave, we agree with the concern that employees who are on military leave should not be disfavored vis-a-vis other comparably situated employees who are offered more generous leave terms. But we think there are several groups of people whose leave in fact is not comparable to military leave, and we urgently request a carve-out for those people.

Specifically, we are concerned with people whose conditions of leave are mandated by Federal, State, or local law, such as the Family and Medical Leave Act, where Congress has decided that

certain things have to go to people who take up to 12 weeks of parental or medical leave for themselves or their family; or jury duty, where local laws require that employers pay people while they are on jury duty. And the other issue is people covered under collective bargaining agreements. If you require employers to extend collectively bargained privileges to everyone else, you put severe pressure on the whole bargaining process. We think there should be a carve-out for that as well as for very short-term leave, like bereavement leave, sick leave, that sort of thing, where employers generally just continue people as active employees rather than take them on and off. It could get real unworkable to take a military leave person for 2 days or 3 days and then change their benefit conditions. And there are also specific conditions worked out for people in individual ad hoc kinds of arrangements to accommodate them while they are on leave for alcoholism treatment or for maternity, that sort of thing.

My time is running low so I can't more significantly address the issue of requiring employers to make up pension earnings and making sure that this law doesn't force employers into a position of having to decide whether to comply with the Internal Revenue Code or the veterans' reemployment rights law. The Treasury Department has made those points and I assume that is part of what is under consideration at the Labor Department.

I will be happy to address any of these in detail with you now or later. Thank you.

[The prepared statement of Ms. Mazo appears on page 52.]

Mr. GOTTLIEB. We will ask you some questions and give you the opportunity to talk about that later.

Mr. Gribbin.

STATEMENT OF D. J. GRIBBIN, LEGISLATIVE REPRESENTATIVE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. GRIBBIN. Mr. Chairman, my name is D.J. Gribbin, and on behalf of the 600,000 members of the National Federation of Independent Business, I want to thank you for inviting NFIB to participate in this hearing.

I want to start by saying that NFIB strongly supports the goals and objectives of S. 843, the Uniformed Services Employment and Reemployment Rights Act of 1993. We strongly believe that employees who leave to go serve their country should not have to go serve their country and at the same time worry about whether or not they are going to have a job when they get back. I would also like to begin by commending the Committee and its staff for taking care of a lot of the unintended negative consequences we think that last Congress' bill would have had on small business. Yet although a lot of changes and improvements have been made in this legislation, there are still two basic layers of concerns that we have about the bill.

The first layer is a number of technical concerns that we have, and the second one is a concern that we have about more fundamental underpinnings of the legislation. Let me start with the technical problems. I think these problems are minor; I think they can be

solved in such a way that the Committee can still accomplish all of its objectives in passage of this legislation.

First, I want to second what APPWP said about treating employees who depart from the workforce and go into the military as if they are on leave and giving them the same benefits that you would give any other employee on leave. Small businesses are relatively unique in that they do not have employee handbooks; they do not have rigid formulas that say, OK, you're this type of employee, you get this type of leave. We are concerned that you could end up in a scenario where a small employer might have someone who has got a particularly serious illness or who has been an excellent employee and they want to give them an extra week of paid leave as a bonus, and that could then be considered a practice under the legislation and the employer would then be required to give the same amount of paid leave to anybody who departed his employee to go into the uniformed services.

The second technical concern that we have deals with health insurance. The bill sets up COBRA-like benefits for people who leave and go into the service, and it provides those benefits to employers of under 20 employees even though the original COBRA law applies only to people who employ 20 or more employees. So we are concerned that you could have a scenario where in a small business of under 20 employees, a person who leaves and goes into the military is eligible for a benefit that none of the other employees are eligible for.

An additional health insurance concern deals with the waiting period. The bill says that an employer cannot impose a waiting period on a veteran returning to that business. We completely agree that veterans shouldn't have a waiting period imposed on them; however, small businesses purchase health insurance through insurance companies and have absolutely no control over that waiting period. So there needs to be a minor change either in the legislation or in report language that says that employers will not be liable if a waiting period is imposed, since those employers actually have no control over that waiting period.

And finally, on the technical side, I want to praise the Committee and its work on defined profit-sharing pension plans. It has really cleared up a lot of the problems that small businesses would have had with last year's version of the bill.

Let me now transition from the technical to a concern that we have with one of the major underpinnings of the legislation, and that is its treatment of people who leave a job to go into the military voluntarily, versus people who are called up or drafted out of a job. The veterans' reemployment rights law was created in an era when it was not unusual for people in the military to find themselves there involuntarily. A lot of things that were part of that original law made sense then, but now since we have an all volunteer force, may not make as much sense.

The scenario I would like to spin out that sort of gets the least sympathy from the small business community is when you have an employee who decides it's time for a change, who wants a different career, and he leaves his job thinking the military is the best thing for his future. He goes into the military and while he is in the

military he decides that maybe this isn't such a great idea, serves his full tour of duty, and comes back to the workforce. He can go to the old employer and demand his job back, plus with the escalator principle, any promotions he may have received plus any benefits that would have accrued in the meantime. This scenario, from the small business owner's standpoint, doesn't make much sense. This employee in essence quit his job to go to another job. And since we are beginning this process again, looking at the legislation with this hearing, we think you might want to revisit that issue.

I see my time is up. I would be pleased to answer any questions you may have. And again, on behalf of NFIB, I want to thank you for inviting us to participate.

[The prepared statement of Mr. Gribbin appears on page 61.]

Mr. GOTTLIEB. Thank you. It sounds like we have just about resolved all the outstanding issues. We should probably say the hearing is adjourned and let's vote on the legislation. [Laughter.] I have a feeling that is not exactly the case, so maybe we will discuss a little of that.

Written testimony by the Non Commissioned Officers Association characterized VRR law as "legislative patriotism." NCOA notes, "What is at issue is fairness to the servicemember balanced against the financial ability and responsibility of the employer to subsidize military service." DOD, on the one hand, says that VRR is critical to a strong defense; on the other hand, NFIB says that small businesses support the concept of job security for people protecting the country, but that the Chairman's bill, S. 843, crosses the line in some ways of appropriate rewards. You object, I guess, to some of the VRR concepts that, as you have just stated, have been in law for 53 years, but you state that the situation has changed.

We would appreciate discussion of that, especially John and I, who are new to the Committee. While many of the members have been through this before, we haven't been, and we would very much appreciate if you would discuss, in a little more detail, the VRR philosophy, where you think the line should be drawn to balance these competing interests. In particular, we would be interested if you would talk a little bit about the following issues: What civilian benefits should a person have while on military active duty, and why? Should small employers be exempt—that seems to be one of the key issues here—and why or why not? You probably are aware that the VFW will testify on the next panel that employers with 50 or less employees should be exempt from VRR totally. That is obviously not the Chairman's position in this bill. For purposes of civilian job security, should persons, as NFIB has suggested, who voluntarily sign up to go on active duty for several years be treated differently than Reservists or members of the National Guard who are ordered to active duty?

Why don't we start on this side of the table and see if we can get a discussion going here. That would be very helpful to us.

Mr. RUSH. I think from DOD's point of view, as my statement for the record indicates, we are always concerned with the voluntary, and we rely primarily on a voluntary support of the employers of the Nation. We think it is also important, and the National Committee

for Employer Support of the Guard and Reserve has over 4,000 volunteers throughout the Nation supporting that effort. But I think we certainly feel firmly that a strong statutory base, as the VRR law has provided for the last 53 years and we believe should continue with clarification, is absolutely essential to provide equal treatment and to provide that support.

The current law, as indicated, provides seniority and the prerequisites of that seniority, which the courts have indicated include pension and retirement plans. That's very important. The health plan is also important primarily for continuing care with the same provider for the individual who is activated either as a volunteer or not.

Should small employers be exempt? In our view, no. I think that the law has never made a distinction over this period in the size of the employer. The plans that are in place among employers obviously vary by the size of the firm and what the employee who goes on military service or training is entitled to is what would have been available to him or her had they stayed. So I think that has a balancing effect in itself.

Finally, should there be differences between the individual who is called involuntarily and the individual who volunteers, particularly the individual who volunteers for a 2-year enlistment or something like that? In the draft era, the law didn't differentiate between those who were drafted and those who volunteered, nor do we think it should. I would say, from the point of view of the Department of Defense, that it is very difficult in an all-volunteer era to differentiate between types of service. We will always need members who serve for 2 years, whether they are coming from civilian life into critical areas, whether they are coming from the Guard and Reserve, or whether they are called, as in Operation Desert Storm, involuntarily, even though there were many volunteers and those volunteers were vitally needed early on. So I think that those types of definitions from our point of view would be unworkable.

Mr. DUANY. Where to draw the line? Philosophy. I think the way I have always viewed the VRR law conceptually in terms of the employer—and by the way, during Desert Storm, mainly because we were overloaded, I had to speak with a lot of employers who were calling in looking for clarification and I was surprised to find that many employers were looking at how to protect their employees. I had a personnel director who said, "Can we pay them?" I said you are not required to, and they said, "Well is there any way we can pay them?" And I said, well, in the Federal Government, we donate leave to these people so they can continue to get paid as long as leave donations keep coming in. This guy was overjoyed because now he could go to the board of directors and say why don't we ask the other employees to donate leave so we can pay them.

In other words, I am concerned because the response I have gotten from the employer community has been outstanding. Part of the reason for this is that the philosophy that I always espouse is basically I see no difference between GI Joe going out there and a security guard for an enterprise; i.e., they need a security guard to protect against some incidents of arson or sabotage or stealing and

they ask a regular employee to go out there, and, hey, we need some volunteers to guard the line.

There is no difference here. The only thing is this individual may be far away. They are still protecting that business and they are still working for that employer because without that protection, what business would survive? This needs to be made clear. In other words, the service of these people is in the interest of not only this enterprise, but all the enterprises. And thus we have always looked at treating the servicemembers as if they had never left the employ of the firm.

You went on with a lot of questions on benefits while on active duty. Obviously, if the idea is that individuals not be harmed because of their service, you would look for certain benefits to be available so that the individual would have an incentive to go and serve the Nation, rather than disincentives. The way you phrased the question, I think you are talking about benefits while they are on active duty. I think there are few that fall into that category. Generally, all the benefits we're talking about become exercised upon reinstatement to the employer.

First, talking about numbers, let me give you a figure that my staff worked out, that generally it is important to note that 85 percent of those who are leaving the service are less than 25 years old. To me, that would indicate that most of these servicemembers did not have a preservice employer. In other words, when you are looking at full-term enlistments, you are talking not about the entire military force. Generally, people take different roads. Most people go into the service upon leaving high school, with no preservice employer. You do have some that were employed and they volunteered, and this is what we're dealing with. The issue is should you deny these people a position they would have held when they come back had they stayed with that employer. OK?

There is another issue. We rely, as I said, more and more on Reserve and Guard. We rely on volunteers. We rely on skills that are becoming more sophisticated every year to defend this Nation. One of the problems I have is this: We can always count on people to be very patriotic and go and serve. However, I am married; if I were to serve and you told me, yes, but, well, your income is not going to be there and you have no health insurance for your family. . . I have got three kids. The moment those disincentives start going up in that scale against my patriotism, you are going to lose a lot of the key skills. You are going to have a lot of the people who serve now who are going say, "Hold it. I may want to serve my country, but I am going to be so harmed that I can't afford to. I can't do that to my family." And this is true for the type of people who are serving in the military today. So this needs to be a consideration.

And finally—and I might have skipped some of the questions; you went very fast and I am very slow—the last point was the VFW saying that maybe we should exempt employers with under 50 employees. Thank heavens they give us testimony, because I had my staff go out and call the Census Bureau with one question. "How many employers in the United States have less than 50 employees?" Census was very nice; they sent us a table. Ninety-six percent of the

employers in the United States have under 50 employees. I don't think I have to say any more. Are we going through this exercise to cover 4 percent of the employers in the United States? Since 1987, we have been working on this. I don't think so.

Did I miss anything from your questions or have I covered it all?

Senator AKAKA [assuming chair]. May I ask in that regard, do you have a definition of small employer?

Mr. DUANY. I wouldn't dare set one for it. My testimony is based on the concept that if two people go to service, let's say they are out there now because there are some people out there now, let's call them Tom and Dick. You don't want them coming back on that plane or on that ship and Tom says, boy, next week I'll be back at work and this and that, my family is happy I'm coming home; meanwhile, Dick is saying, gee, I just found out my wife had an operation and I am going to come back to all these bills and I don't even know if I have a job to go back to because I work for a small employer. In other words, you don't want to get into this. One of the worst things you can do if you are going to try to maintain morale and a good defense posture is to start creating situations where the servicemembers are feeling very differently as they are coming back or when they volunteer. Because very obviously in this situation, Dick is going to say, "Why am I serving. Obviously we should leave this service thing to the big companies." That would be very demoralizing and I think also absurd.

The whole concept of VRR law is that you want to give every citizen of the United States an opportunity to exercise their patriotism without having this knowledge that if they do, not only will they risk their lives, but when they come back, they may have risked many other things relating to their future, their career, or their family. I think the other situation was this is a "volunteer" versus a "nonvolunteer." I think there is a wall out there for Vietnam veterans. It doesn't say "volunteer," "draft," "career," noncareer," or use colors. The names are etched in gold. Let's keep that up.

Senator AKAKA. Thank you.

Mr. GOTTLIEB. The 96 percent figure that you use is employers.

Mr. DUANY. Employers.

Mr. GOTTLIEB. What percentage of employees would be covered or would not be covered—whichever figure you want to give me. And if you don't know, could you provide that for the record.

Mr. DUANY. I will be glad to provide that for the record. I would assume you are saying that since small employers have less numbers of employees, that it would be a totally different percentage. It would probably be smaller.

Mr. GOTTLIEB. I am just a little hesitant about the use of statistics, so I always like to know what the other side of those statistics are, so that as we deal with these arguments—and obviously, we've taken a position about this—we are able to argue in the most informed way. So if you could provide that, it would be helpful.

Mr. DUANY. We'll be glad to provide that for the record.

[Information provided by the Economic Census and Surveys Division of the Bureau of the Census shows that 34 percent of employees work for employers with fewer than 50 employees.]

Ms. MAZO. On that point, I think you will find that more than half of the employees work for employers over 50. Those data were developed in connection with consideration of the Family and Medical Leave Act.

Mr. GOTTLIEB. So it is a "half full, half empty" kind of situation. A half would be covered and a half would not be covered.

Ms. MAZO. Something like that, yes. It is not 96 percent. And the number would—

Mr. GOTTLIEB. So it is still a large percent that would be covered and would not be covered.

Ms. MAZO. That's right. The number is available in the reports on the Family and Medical Leave Act that was passed earlier this year, because they have a 50 employee cutoff for eligibility.

Mr. GOTTLIEB. I plead ignorance. [Laughter.]

Ms. MAZO. I sort of pay attention to these things. I would also like to note that once someone has been on military service for I believe it is 31 days, their families have CHAMPUS available to them. So health insurance is available after a fairly short period of time. It may be a little longer than that; I don't remember exactly what the waiting period is.

I think our view on the question of what civilian benefits should be available while someone is on active duty is related to the matter of employee benefits while they are on military duty, whether or not they return to work. And most of our members in fact voluntarily did give very generous leave, as this gentleman has said, during the Gulf War. The issue is hitting employers increasingly in ways that it didn't under prior conditions, because with the shrinking of the full-time Army, the drawing on the Reserve force, as happened in the Gulf War, means you have people who do have substantial job connections and who do expect to return to their jobs and whom the employers want to return to their jobs. So employers are certainly much more willing to provide any kind of support for reservists than they would be for other employees. But we can't say the issue washes away because no one ever goes back to their first job after high school or something like that. It remains a significant issue, which is why we're concerned about its administrability.

I guess the test that we think is appropriate for treating fairly these people who go on military duty would be that they should not be discriminated against in terms of benefits that are generally available to other employees in comparable kinds of situations, which is what we were asking for before. Where you have specially targeted issues aimed specifically at employees with a uniquely defined need, we don't think you should have to turn around and extend that to another group who doesn't have that exact same need. The military people, for instance, have health insurance through the military. Someone who is disabled or something like that, if they are not seriously enough disabled, they have to wait at least 2 years to be on Medicare and they have nothing else to support them, so employers do have to address their needs. The military people are taken care of to a great extent. But if there is a general principle of other kinds of protections, it is not improper to require that people on military leave get the same consideration.

The one thing we are concerned about is that the extension, for instance, of the highest and best leave benefits applicable to anybody could end up—the requirements to deal with people on military service should not be viewed by employers as so burdensome that they will terminate those benefits for everyone rather than being forced to extend them across the board. That is something that we are very concerned about. And that is, in fact, a major issue on things like the makeup of earnings which your Committee has recognized and the House, unfortunately, did not recognize and that Treasury pointed out. That could lead employers to stop having plans if they have to pay such a large and unusual amount for military service people.

On the small employer question, I think I will leave most of the commentary on that to the NFIB. We do note that there are a number of laws that recognize the unique needs of small employers or the difficulty that they might have in accommodating the absence of people or in affording benefits for absent people. COBRA has a small employer cutoff of 20 employees; the Family and Medical Leave Act has a 50-person cutoff. What is the right line? You can define that among yourselves, but it certainly does not seem inappropriate.

As far as treating volunteers differently from other people, I think it is a little hard to figure out, frankly, exactly who is a volunteer. For instance, people who are in the Reserves or National Guard have volunteered to be in the Reserves or National Guard. They are called up without volunteering in a specific callup, but they have volunteered to make themselves available. So would they be in or out? I understand the concern expressed by the NFIB, and we share significant concern with the potential for abuse for anybody who volunteers, in particular if there is no period of service with the employer before someone qualifies for all these benefits. You could work for an employer for a week in order to get, for instance, the comparable leave benefits; you could work for an employer for a week and then get fully paid health insurance for your family or something for up to 18 months. Similarly, you could leave, go into the military, come back to an employer for a week and get big profit-sharing plan benefits.

Your bill would protect employers from that abuse, and again, the House bill wouldn't. They could come back for a week and under the House bill, get 5 years' worth of profit-sharing contributions, quit, take it all in cash. That is a nice, handy little thing, and all it cost you was a week before you go to the job you really want. Rather than necessarily drawing the line at volunteers, it might be appropriate to consider some sort of length of service before and after for at least some of the benefits.

Mr. GRIBBIN. I think we're sort of mixing two concepts here. One is what types of incentives should we offer to people who go into the service, and when they risk their lives to protect our country, what kind of benefits should we, as an entire Nation, offer them. The second is what little additional burden should we place on employers in their role in this whole process to make sure that those veterans aren't unduly penalized.

I would like to step back to what the Department of Labor mentioned earlier, which is, I think most employers are more than happy to reward people who are in the Reserves who are called up, need to go and serve, then come back. They are willing to offer them pay, I'm sure they are willing to offer them health insurance, they are willing to do lots of things to accommodate them. Really, what we're doing here is legislating for the exception. But I think when we get down the line to the thought of, well, this person serving in the military really is no different than a security guard for your business, that's not right, because a person in the military is protecting all of us, not just that business owner, and there is no reason to expect that business owner to incur the cost of protecting all of us. So I want to sort of break those two lines of thought apart.

I don't think that there is a great amount of sacrifice entailed in going into the military currently. They are relatively well paid, their families are covered by health insurance benefits. There is a whole CHAMPUS program that has been set up to do that; they are covered by health insurance. So I don't think there is any sort of a draconian hit that they take as soon as they sign up to go into the military. And if CHAMPUS isn't picking up the slack of what the private sector is doing as far as providing benefits, then we should improve CHAMPUS, not try to get employers to pick up that slack.

A couple of other points that I had were on the reservists, whether the reservists would be considered voluntary or involuntary. I think from an employer's standpoint, somebody who is in the Reserves and serving in the Reserves who all of a sudden gets called up into a Desert Storm or something like that, they see that is beyond the employee's control. Granted, the employee did sign up to be a member of the Reserves, but I don't think an employer would have any problem taking care of that employee when he came back. Really, when you get into the voluntary service part of this problem is where you have an employee who quits his job, goes into the military as a career change, and then is able to reverse his decision and come back and demand his job back—that is the real problem in including voluntary people. I think, if I am not mistaken, the Department of Defense pointed out that they are having a problem getting quality people into the military, and that is why we need to make sure that we offer these benefits so we can continue having quality people. It is my understanding that we get three to four people applying for every job that is open in the military, that there is absolutely no problem in getting quality people in the military under current law. And that is pretty much where I'll end my comments.

Senator AKAKA. Further comments? Mr. Rush?

Mr. RUSH. Yes, Senator, two things. One, we are getting very high quality people in the All Volunteer Force era. With the quality of the people that we get in it, we believe that a strong VRR law is one of the things that helps to support military service in support of the Nation. That is why I emphasize the need to continue the types of protections that exist today to maintain that quality, because that quality is going to become even more important as we downsize.

This is a law for noncareer military service folks. Many of the men and women who join the military today would like to make it a

career, but they don't have that option. We are going through the agony of asking people to leave early after 2 years or 3 years of service. When we do that, that is, again, where the VRR laws will come into play.

Finally, one point on the medical care. It is true that when a member joins the military under orders that specify a period of more than 30 days, the member is covered and the member's dependents are covered for either treatment on a space available basis in military treatment facilities or under the CHAMPUS program. But let's take the reservist who is activated. His dependents are under a plan, they have health insurance, and CHAMPUS—it is not that it is inferior, but it is different. The only reason that we can see that a member would pay the full price to continue—the employer's part and the employee's part, plus in the Senate bill, 2 percent for administrative costs—the only way you would do that is if it were very important to provide the same hospital, the same providers that you have had. Not many people are going to do that. In Desert Storm, it was about 2 percent of those who were activated who maintained their health insurance and elected to pay the full cost of that insurance in order to provide continuity of care.

Mr. MOSEMAN. Thank you, sir.

Mr. Gribbin, I am still not quite clear about your position. Should volunteers get no VRR rights, or should they have limited VRR rights? And if they are limited, what kind of rights are you talking about?

Mr. GRIBBIN. I would say volunteers should get no VRR rights. The whole point of protecting the person's job when they come back is you are assuming that they are being pulled out of the workforce out of their control. In my own mind, and maybe I am being simple about this, I guess I don't understand the difference between quitting work and going to work for someone else, and quitting work and going to work for the military. If in my mind that is what I am doing, why should in one course I can after a period of years come back and demand my old job back, when in the other course I can't.

I understand that we want to encourage people to go into the military, but that seems to be going a little far, especially from the employer's standpoint. The employer is left in a position of, gee, I don't know whether this person is coming back or not, but I have to in the back of my mind keep track of where he is in case he finishes his tour of duty and decides he wants to come back. I think there is a strong argument for protecting people who are yanked out of the workplace to serve their country and they need a place to go when they come back. But I don't think that argument applies when you just quit and go do something else.

Mr. MOSEMAN. It would be interesting to hear from the service organizations on that, because I think there could be a totally different view of that policy, that is, those who volunteer perhaps should be rewarded for volunteering.

Mr. GRIBBIN. Oh, absolutely. Let's pay them, let's give them good benefits, let's give them retirement benefits, let's take care of their families. But now we are talking about—and that is the distinction I was trying to make earlier, between what we as a Nation should

bear and what the employer community should bear. I think we as a Nation should do all we can to encourage top quality people to go into the military.

Mr. MOSEMAN. Mrs. Dudley?

Mrs. DUDLEY. If I could follow up a little bit on what Mr. Gribbin has said. Although our membership is generally made up of larger employers, we have some small-plan sponsors, and I think we have an appreciation and I have a concern that in the whole process of designing COBRA, they created an exception for the small business. I think a lot of the reason behind that exception had to do with the concern of the cost that would be imposed on a small employer. Health insurance is very, very expensive for all employers, but especially for small employers proportionately. Many of them get priced out of the market, and there is a real concern that COBRA premiums, although they would be passed on to the employee, don't nearly cover the cost of the insurance.

I think maybe some effort needs to be made to go back into the legislative history of COBRA and to examine maybe why that exception developed there and could we come up with an alternative approach, because we also appreciate the concerns that the Department of Defense has to encourage people to volunteer and to have them have adequate benefits and adequate reemployment rights; we're concerned about that. But we also recognize that for a small employer, they could be priced right out of the market, particularly if the business has a high percentage of employees going. That happened in numerous cases in the State that I'm from, that happened to a number of employers where substantial numbers of their employees were reservists and they would be put in the position of covering the new employees they had to pull in to take up those positions temporarily; and covering benefits for those people, they are covering benefits for people in the military, and so you are talking about a significant cost.

I think we need to sit down and figure out whose responsibility it is. Is it a public sector responsibility, is it one that the public simply can't bear because we've got all that we can bear and it needs to be passed back, and how can we pass it more proportionately, more evenly across the board.

Ms. MAZO. I would like to add just two points. One is, this also raises an issue in which the Senate bill is just head and shoulders better than the House bill, and we really urge you to stand firm, and that is that your bill provides that benefits under an employer plan are only paid to the extent they are not payable under a Government program. That would greatly moderate the impact. So that if someone took COBRA, for instance, because they wanted to maintain a relationship with a particular provider, they could still use CHAMPUS for everything else and that would help some of this.

The other is the standard response nowadays in the benefits community to issues involved with how do we change this provision for health coverage or that provision which is, "Oh, let's wrap it all up in national health care reform." I don't know for sure that will be finalized in time to address all of these issues, perhaps the Senator has greater insights on that, but a lot of these issues might go away,

for instance, if there is a general payroll tax. There would be no way for employers to continue that for people who weren't on payroll and stuff. So I think it is going to have to be revisited in any event.

Mr. DUANY. May I address some of the points that have been raised. I think my greatest concern was this idea that you are going to work for the military. I think there is little sanity in losing your freedom, moving away from your house, getting less pay, putting your life at risk, and for that to be considered another job. In effect, the VRR law has traditionally excluded the career service from coverage. There are limits imposed in VRR law in terms of the time that you serve. So that if you actually went into the military with a career thought, you are going to reach a point where you are now a career person, you have no VRR rights because you made the military your job.

What we are talking about are the rest of the individuals who may serve for one year, 30 days, 90 days, or whatever, being called up in the Reserve, or who serve a full enlistment, whose attachment is with the employer and who are not going to reenlist and expect any rights, but rather, they went in with an attachment to the employer and they intend to return to that employer. That is the bulk of VRR law and in the proposed bill. Eliminate the career service from protection by simply saying, hey, 5 years, you're out.

Mr. GRIBBIN. How do you know when the career—I mean, an employee leaves with a career thought, at what point in time does that person become career? How does the employer know?

Mr. DUANY. There are durational limits in this bill which have been supported by everybody, right?

Mr. GRIBBIN. Well, not us.

Mr. DUANY. Okay. You don't want a durational limit?

Mr. GRIBBIN. No. You're saying that if they become career—that's great and I think we agree with everything you just said. We want to cover the short-term people, we want to cover people who are just going for 3 months, 6 months, a year.

Mr. DUANY. The whole idea is, who do you have an attachment to. If you are going to make the military a career, basically you are looking to reenlist and you are going to reenlist and stay in the military.

Mr. GRIBBIN. Yes, but you don't know that until you actually reenlist. I guess it is a little disingenuous saying somebody who goes into the military as a career isn't covered by this bill, because the employer does not know that until 5 years down the road when they reenlist or however many years it is going to be when they reenlist, that they have actually made it a career. And in the intervening period of time, the small employer is still out there saying, gee, is this guy going to come back or not.

Mr. DUANY. Can I finish the point I was going to make.

Mr. GRIBBIN. Oh, sure. I'm sorry, I didn't mean to interrupt.

Mr. DUANY. Thank you. We also have some introductions of exceptions to the rule, and I am concerned because, as it is now under VRR law, when we look at a case, what we are looking for under the escalator concept, as a matter of fact, is who are you similarly situated to as an employee or because of your job. In reading

testimony, i.e., we wouldn't expect Joe Blow who was in a production line in a company to come back and say, well, I understand the owner or the CEO has a golden parachute and I would like to have it too. Rather, we look at other people who would have been similarly situated to him, and out of practicality that is what we use as the benchmark. To say that a waiter is going to have the same benefits as a chef, or that the driver for the firm the same as the CEO, is just unrealistic. That doesn't happen.

Mr. MOSEMAN. Could I ask in regard to these issues that we've been discussing, do we have any experience from the Desert Storm situation where we've had problems that you've been describing to us? Do we have any data to support one side or the other of these issues?

Mr. DUANY. We will be glad—I mean, for one, yes, we do have some experience. The experience is not very expansive, but, for example, we have 2,500 cases that arose out of Desert Storm and we know how many are related to health benefits, to pension, to reinstatement, to seniority, and so forth. Even that simple breakdown starts giving you an idea of what the issues were and where the disincentives are.

Mr. MOSEMAN. Would you be able to provide that for the record? I think it would be very helpful to us to have that.

Mr. DUANY. Sure. No problem.

[The following information was subsequently provided:

In fiscal year 1992, the Veterans' Employment and Training Service opened 2,332 veterans' reemployment rights cases on behalf of veterans, reservists, and Guard members. The issues involved in these cases are as follows:

Reinstatement	1,146
Lost wages	485
Termination because of Reserve obligations	430
Status issues	271
Seniority issues	190
Vacation	154
Discrimination in employment	136
Pay rate	127
Pension	95
Other issues	93
Other benefits	53
Layoff	28
Health Benefits	14
TOTAL	3,222

Some of these cases involved multiple issues, resulting in the number of issues being greater than the number of cases.]

Senator SPECTER. May I interject for just a minute. I wanted to stop by and pay my respects and thank you all for coming. The

Senate hearing schedule is inordinately complicated. As you know, the wife of Chairman Rockefeller, Sharon Rockefeller, had a mishap yesterday, so he is not here. But I just wanted you to know that there are Senators who will be paying attention to what you have to testify and we have staff here who will be looking over it. I have four hearings scheduled simultaneously this morning, but I wanted to come by specially to make the effort because I had suspected that there might not be too many of us here. You are in good hands. Thank you for coming and your testimony will be closely examined. Thank you.

Mr. DUANY. Thank you, Senator.

Mr. MOSEMAN. A technical question, if I can.

Mr. DUANY. Excuse me, can I just finish. I wanted to address some of the other points. I think one of the problems that I have is that VRR law has been something that has existed for many years. It has been a longstanding national policy. It worked for us at the time of the draft and at the time of the volunteer army, and with some glitches it has worked for us now that we rely more on specialty skills and Reserve and National Guard and other people. I would hate to think that we're going to look at this as a short-term thing and look at the environment today and say "let's legislate" based on it.

This is going to have to last for a long time. It may be a key element of how we handle a future major situation, although right now, I agree with you, we're not expecting one. But assume that 20 years in the future, one arises. Are you going to say now we want people and we need large numbers of them and they are not trained, and the employers don't want to let them go and these people don't want to come. Let's be realistic, there is a reason why VRR law exists, and you need to be conscious that most people are not looking during most times to go in and risk their life when there is a conflict. There have to be some incentives for people to volunteer patriotically to go and serve and go and fight and be away from their families or disrupt their future for a few years while they serve the country. This is key to VRR, and I want to make sure it doesn't get put aside.

Mr. MOSEMAN. Is it the view of the Government that this bill as drafted would supersede or be superseded by the Family and Medical Leave Act? Or does it depend on the benefits that a particular employer is offering?

Mr. DUANY. Again, I think the problem with that is we would tend to look in most situations at the individual case and who is similarly situated. In other words, you are talking about would an investigator assume that because Joe, 3 years ago on a special situation, particularly since he is the son-in-law of the owner, got 3 months off, that he is going to get 3 months off. The answer is, no. Nobody would use that as evidence to prove a point. They would look at what has happened with all of the employees or employees that are similarly situated. I think that we can work with the Committee to look at this, but I think realistically we tend to look more at what is normal for the situation, for the employee, for the job, for the individual. If you stick to the escalator concept, what it would tell you is what happens to other individuals. You are always comparing, ideally, the individual who works next to this individual and what is his leave experience.

I keep hearing about exceptions and not the rule. The rule is if two people work in a line, you find out what happened to the other guy in determining what benefits would accrue. Normally, reason prevails because of the escalator concept.

Ms. MAZO. I think the escalator concept looks at similarly situated people in terms of the rights of a returning veteran. But what we were concerned about is the comparable benefits requirement gives rights to people who leave the employer, whether or not they return. And as currently drafted, it seems to give them the rights that anybody has under any kind of leave that the employer offers So this would not supersede the Family and Medical Leave Act, it would, I think, import into the rights of the departing military person the rights that someone who is going on family and medical leave would have, because Congress decided that family and medical leave generates certain rights.

Mr. MOSEMAN. Thank you.

Mrs. DUDLEY. If I could add one or two points. The concern that we have in part about the comparable leave has to do with the fact that the way the language is currently written, it elevates people up to benefits that they wouldn't have had if they had remained employed. It crosses over union and nonunion so that people that are nonunion could get collectively bargained benefits. It is unclear with respect to the treatment of someone who is employed on a temporary or a part-time basis. I think the idea behind the language in this particular paragraph had to do with trying to reach out and give them comparable benefits, and that is why we have suggested this approach, where you look at these special circumstances. We had worked out language with the staff last year that we were, I think, all basically comfortable with that did that. Although we recognized the concerns that the Committee had to ensure that the people on military leave were not being discriminated against, so we even tried to refine it a little more in our testimony this year to make it more particular, so that it tried to specifically carve out the things that we were worried about. I think that is really where our concern lies.

Mr. DUANY. I'm still a little confused, because the problem I have is that the Uniformed Services Employment and Reemployment Rights Act does not provide any benefits to an individual that they otherwise would not have had. We're dealing with a law whose intent is not to harm the individual. I am failing to see—and if I am correct, parental leave basically means if a woman is pregnant and she is going to get leave or et cetera. I don't see where a servicemember could claim that was going to accrue to him when he was away on service. In other words, this is an entitlement that never would have existed unless the individual had been in that condition before they could claim it, and if they were in service, they were obviously not in that condition.

Ms. MAZO. It sounds to me like the Department basically agrees with the philosophy that we're expressing, and we're really talking about how the bill is drafted. We would agree with that, but the way the bill is drafted it looks as though any kind of leave the employer offers any employee, that those same benefits have to be offered to someone on military leave even if he or she wouldn't have qualified

for them under any other condition. If everyone is agreed that it should be benefits that the person would otherwise have qualified for, and not specially targeted benefits that they wouldn't have qualified for, like maternity leave, then it is just a question of clarifying the language.

Mr. DUANY. That's the reason I've come back to the escalator concept. I am saying these individuals are not entitled to any windfall benefits at all. That is clear in the escalator concept and in all the case law that exists.

Ms. MAZO. Great.

Mr. DUANY. That is something that we don't see the bill providing for. And the regulations will not provide for that, I can tell you that.

Mr. MOSEMAN. Good. Agreement is good. I am told that the Treasury Department's prepared statement says that the VRR law must not operate in such a way as to cause pension plans to fail under the IRS rules. Do you all agree to that?

Ms. MAZO. Absolutely. That is very important. And your bill makes sure of that and the House bill does not. The Treasury Department testimony calls for more precision in the way your bill is drafted. That would be fine, although we think we could live well within the language of your bill, as least as to the pension plan issues. We think there could be some more clarity in terms of the COBRA coordination.

Mr. GOTTLIEB [assuming chair]. Thank you very much. This has been very helpful to us. I appreciate your cooperation today. The Chairman obviously appreciates your participation and your continuing to work with the Committee as we move forward with this, which obviously we intend to do. Thank you very much.

Today's second panel represents interests and concerns of the servicemember employee. Our first witness will be Mike Brinck, national legislative director of American Veterans of World War II, Korea, and Vietnam. Our second witness will be Len Gilmer, associate national employment director for Disabled American Veterans. Our third witness will be Jim Hubbard, director of The American Legion's National Economic Commission. Our fourth witness is Bob Manhan, assistant director for the VFW's National Legislative Service. Our fifth witness will be Major General Bob Ensslin, U.S. National Guard, retired, and executive director for the National Guard Association. And completing the second panel will be Lieutenant Colonel Jim Rodenberg, U.S. Air Force, retired, legislative counsel for the Reserve Officers Association.

As is always the tradition here, we will limit our oral testimony to 5 minutes and then we will have a few questions, or the Chairman in absentia will have a few questions.

Mike, why don't we begin with you?

STATEMENT OF MICHAEL BRINCK, NATIONAL LEGISLATIVE DIRECTOR, AMERICAN VETERANS OF WORLD WAR II, KOREA, AND VIETNAM

Mr. BRINCK. Good morning. Thank you for requesting our views on veterans reemployment rights legislation. Let me begin by saying that while H.R. 995 improves a veteran's reemployment prospects, S. 843 appears more favorable to the veteran, yet strikes a balance

that will provide reasonable reemployment rights while not placing an undue burden on employers.

Department of Labor statistics show referrals to the Department of Justice in fiscal year 1992 nearly doubling over fiscal year 1991, with a slightly smaller new caseload. In fiscal year 1991, DOL opened 2,539 new cases, with an average closure time or referral of 48 days. In 1992, they opened 2,332 new cases, with an average closure or referral time of 56 days. Initial statistics also show a drop in new cases and referrals in 1993.

At a time when U.S. corporations are shifting facilities overseas and multinational operations are common, it is important to extend VRR to those veterans employed in overseas positions, and we support S. 843 in that regard.

With many employers converting full-time jobs into temporary positions, it is important to cover veterans filling temporary positions to the extent that the positions still exist at the time of application for VRR. H.R. 955 excludes temporary positions, and AMVETS feels this may provide an incentive for employers to convert jobs to avoid VRR.

AMVETS supports the stronger provision in S. 843 that would require OPM [Office of Personnel Management] to ensure that a civil servant veteran is offered a similar position in a Federal executive agency. Likewise, we prefer the Senate bill's more aggressive position on behalf of judicial and legislative branch employees and National Guard technicians that will also require OPM to ensure similar employment and to waive competitive status.

AMVETS agrees with the S. 843 provisions guaranteeing rights or benefits in the manner of those employees on furlough or extended leave of absence. We feel the 18-month limitation with the ability to resume uninterrupted coverage upon application is a reasonable approach, as well as the imposition of the maximum 102 percent premium health plans.

We are all aware of the long adjudication times to establish entitlement to VA treatment for service-connected injuries or illness. Therefore, since VA may not have established service connection at the time of application for VRR, it must remain the employer's responsibility to cover treatment costs to the limit of the policy. AMVETS suggests VA be required to reimburse the health plan and/or the employer for any payments and/or copayments made during the adjudication period if and when service connection is established.

AMVETS agrees with the Senate bill that use of civilian leave should be limited to that accrued at the commencement of service.

Pension plans form the major retirement planning vehicle for many employees. Therefore, it is important that those called to duty be treated in the same manner had they remained on the job. Therefore, AMVETS prefers the treatment of employer contribution contained in H.R. 995 over the Senate's more restrictive provisions. However, we prefer the more precise definition of the retroactive payment period contained in S. 843, and we also support the Senate bill's section that incorporates the escalator principle.

For purposes of discussion, AMVETS would like to propose that the responsibility for administration and enforcement of VRR be moved from the Department of Labor to DOD's Office of Guard and Reserve Affairs. We are concerned that fiscal problems are forcing DOL to cover more and more responsibilities with fewer and fewer resources. It would also be in keeping with the bill's stated purpose, "that the Federal Government should be a model employer." Since many private sector businesses are offering significant outplacement services, including counseling and retraining as part of reductions in force, why shouldn't DOD do the same.

We prefer the S. 843 enforcement provisions designating Federal district court as having jurisdiction, the use of Special Counsel, the use of subpoenas in VRR cases by DOL, and the inclusion of the Federal Government as subject to subpoena.

Mr. Chairman, to summarize, while the differences between the two bills are often minor, AMVETS feels that with some modifications, the Senate bill strikes a better balance. As always, we thank the members of this Committee for their fine work on behalf of veterans, and we urge the adoption of this important legislation.

[The prepared statement of Mr. Brinck appears on page 68.]

Senator GRAHAM [assuming chair]. Thank you very much, Mr. Brinck. We appreciate your testimony and your participation in this hearing today.

Mr. Gilmer, associate national employment director of the DAV.

STATEMENT OF LENNOX E. GILMER, ASSOCIATE NATIONAL EMPLOYMENT DIRECTOR, DISABLED AMERICAN VETERANS

Mr. GILMER. Thank you, Mr. Chairman and members of the Committee. On behalf of the Disabled American Veterans, I want to take this opportunity to thank you for your ongoing concern and interest in providing meaningful employment opportunities and protections to our Nation's veterans.

I have submitted written testimony and ask that it be made a part of the record. We are very appreciative of your introduction of S. 843, the Uniformed Services Employment and Reemployment Rights Act of 1993. Mr. Chairman, overall we support the intent of this bill.

I would note it is our understanding that this bill and the companion legislation in the House were introduced to codify court rulings and regulations so as to put in one place in law what is intended by the Veterans' Reemployment Rights Act. Unfortunately, some of the testimony I heard this morning would undo those rights. If their testimony were to result in changes in the bill which were consistent with that testimony, we would have to oppose such legislation.

Mr. Chairman, the Veterans' Reemployment Rights Act embodies a simple concept, the citizen-soldier who serves in this country's armed services should not have to suffer the loss of their jobs when serving their country. Not only have court decisions supported and expanded this concept with little controversy, so have this Nation's employers. The employer response during the Persian Gulf War was a good example of how many employers extended themselves far

beyond what was legally mandated to ensure that health care benefits covered the families of Reserve and Guard members who were called up; in some cases, employers paid the difference between the civilian and military wages, and in other cases, extra leave was granted to allow families to be reunited before the Reserve or Guard members had to return to work.

During the crisis, employers responded not all in the same way, but in significant, supportive ways. For this reason, we believe that the vast majority of employers when faced with a real situation rather than a hypothetical one will continue their longstanding support for this program.

Mr. Chairman, as I listened to testimony this morning, I thought it was very interesting that the National Federation of Independent Business representative compared joining the military service to a change of jobs. I couldn't help but think about the fact that when these laws were originally passed, a much higher percentage of American families were affected as a part of the national population when compared to today. People who are veterans, members of the armed services and their families, make up a much smaller percentage of the total population today. So I think it is interesting to note that as this population diminishes, there is a lack of knowledge of what it means to serve, and the impact of military service on families and individuals was reflected in this morning's testimony.

I think interestingly, too, they obviously are not aware of the transition difficulties. We have testified before this Committee and in the House many times regarding the extended unemployment that occurs following military service, the difficulties of the disabled veteran in obtaining employment, and the ongoing challenges that result for people who bring with them disabilities and other problems that may be directly due to their military service. Apparently, that was completely lost on some of the people who testified this morning.

We are particularly pleased with the improved protections for Federal employees, also provisions for covered employees to purchase medical insurance while activated, and the fact that all employers are covered. We believe that historically, all employers have been covered. We know of no reason to change that. As a practical matter, we don't know that there is any cry from small employers to have themselves exempted from coverage.

We think that the medical coverage provisions are a logical extension of laws requiring that dependents who might normally lose health care insurance due to their age can purchase health care coverage from their parents' employers and the COBRA medical care protections for those people between employment. We don't know why similar provisions shouldn't be extended to those people who have civilian careers interrupted for military service.

We would also note that in our testimony, we raise the question of having temporary employees covered by this legislation. We noted that we didn't see that coverage in the bill. Since that time, we have had discussions with your staff, indicating that was an oversight on our part; we want to correct that. We would note that employers more and more are going to temporary employees who are not full time so that they do not have to provide benefits. We think that more and

more people who serve in the armed services will be affected by those practices. We think it is important that these employees be covered.

Thank you.

[The prepared statement of Mr. Gilmer appears on page 72.]

Senator GRAHAM. Thank you very much, Mr. Gilmer.

Mr. James Hubbard, director of the National Economic Commission of The American Legion.

STATEMENT OF JAMES B. HUBBARD, DIRECTOR, NATIONAL ECONOMIC COMMISSION, THE AMERICAN LEGION

Mr. HUBBARD. Thank you, Mr. Chairman. My testimony is before the Committee and I hope will be made part of the record. I will, therefore, limit my remarks to some of the other testimony this morning, and then tell you about a survey that we did which I have not provided as part of my testimony, but it is part of the hearing record developed for this issue last year. I would be glad to provide you with another copy for this year's hearing record if you so desire.

[The material appears on page 169.]

With regard to the issue of volunteering for the Armed Forces or enlisting, as opposed to being a member of the Guard or Reserve while employed, one critical thing has been missed this morning, and that is what if there is a general mobilization, however unlikely that may be. The problem is that during the period of a draft, there will be people who for patriotic reasons or for purely personal reasons may choose to enlist as opposed to submitting their name to the Draft Board, with the idea of serving in a more desirable military occupational specialty. Those people are probably not career military people. They will leave when a drawdown begins after a general mobilization and after a period of conflict, and they ought to have the right to go back to their jobs. They enlisted, to be sure, for a personal reason, and true, they were a volunteer, but they had no intention of making it a career. They deserve their jobs back.

With regard to the distinction between small employers and large employers and where do you draw the line, the distinction is irrelevant as far as The American Legion is concerned. The concept here ought to be to treat every employee equally no matter how large or how small that employer is.

With reference to the AMVETS proposal to move the enforcement of veterans' reemployment rights to the Department of Defense, we would oppose that move. The VRR enforcement provisions perhaps could be made stronger, but leaving them in the Department of Labor is desirable, because at this point in the Department of Labor there are representatives in every State who are expert in handling VRR. The solution is not to move the enforcement of VRR to another agency; the solution is to properly fund the agency where it now resides.

With that, I will stop and be happy to answer any questions.

[The prepared statement of Mr. Hubbard appears on page 76.]

Senator GRAHAM. Thank you very much, sir.

Mr. Robert D. Manhan, assistant director, National Legislative Service of the Veterans of Foreign Wars of the United States.

STATEMENT OF BOB MANHAN, ASSISTANT DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. MANHAN. Thank you very much, Mr. Chairman. Generally speaking, the Veterans of Foreign Wars (VFW) does agree with the overall concept of S. 843. However, we offer five points to consider to make it possibly an even better bill.

The first issue regards the size of the company or firm that should be required to provide the full range of VRR entitlements. We are concerned that the startup entrepreneur who has limited capital and perhaps is getting by on a "shoestring" shouldn't be required to do this. If you don't want to limit the size of the firm or the corporation, and we offered 50 people only as a strawman, then we suggest following the philosophy of H.R. 995 by eliminating all temporary positions for all VRR entitlements. That's our first point: Either limit the size of the company or do away with temporary positions for VRR.

The second point relates to your section 4303 that deals with extraterritorial coverage. We would like to add one thing to make that clause stronger. Where a veteran cannot be rehired in the overseas position, whenever possible why not have that international corporation try to find the veteran a like position in an affiliated portion of the corporation?

The third point deals with your section 4314, judicial and legislative branch executives and National Guard technicians. I want to split that in half. We feel that employees of the judicial and legislative branches should be treated the same way as veterans who are returning to any other job or position and follow the same outlines as the private sector does, using the Office of Personnel Management only as a last resort. When we talk about National Guard technicians, these are highly skilled people, and whenever they lose their job because of a military reorganization or a military reduction in force, VFW says the Department of Defense should be the primary source for reemploying these technical persons, using OPM only, and only, as a backup.

The fourth point deals with your section 4316, regarding rights and benefits provided by statute. We would like to add one clause for your consideration, that the returning veteran is entitled to receive a one-time grant from his respective branch of military service to cover up to 80 percent of all of the benefit costs to catch up with his share of the costs for continuing benefits. The money would come from, if he is in the Army, the Department of the Army's unemployment compensation appropriation line item. It is certainly cheaper to pay 80 percent of the returning veteran's share of the civilian benefit costs than to give him 26 weeks of initial and then possibly continuing unemployment compensation. This money is in the Defense budgets for each of the uniformed services.

The last point is your section 4316, dealing with period of protection from discharge upon reemployment, except for cause. There are so many different periods of being called up for active duty—3 months, 181 days, and 2 years. The VFW supports the periods outlined in H.R. 995. Generally speaking, there is no reservist or

National Guard person who can afford not to go back to work to get a paycheck, so I don't think you're going to have people abusing their period of protection.

This pretty much summarizes our position, Mr. Chairman. Thank you very much.

[The prepared statement of Mr. Manhan appears on page 82.]

Senator GRAHAM. Thank you very much, sir.

Major General Robert F. Ensslin, the executive director of the National Guard Association of the United States.

If I could indulge the liberty of the Chair, General Ensslin and I have had a close association for many years. He served as the adjutant of the Florida National Guard during the period that I was Governor and presided over some extremely difficult circumstances, always with great ability and command. I am personally pleased that he is now going to be assisting this Committee as it develops policy for America's veterans.

STATEMENT OF MAJOR GENERAL ROBERT F. ENSSLIN, JR., NGUS (RET.), EXECUTIVE DIRECTOR, NATIONAL GUARD ASSOCIATION OF THE UNITED STATES

General ENSSLIN. Thank you, Mr. Chairman. I think I should quit now. [Laughter.] We would like to thank the Committee for the support that you've provided in the past to citizen-soldiers, including Guard and Reserve personnel in the Montgomery GI Bill. The VA home loan benefit has been a big plus. We especially appreciate your efforts during and after Desert Storm to ensure that we protected those members who were called up—medical benefits, counseling, malpractice coverage for physicians, et cetera.

The bill being considered today is a more detailed action to correct a number of the problems uncovered during that callup. Overall, we applaud the efforts of the Committee. We have examined both the Senate bill and the House version, and we fully support the goals of both. We have continued to believe that the provisions of the Uniformed Services Employment and Reemployment Rights Act must be fair and equitable both to the military member and to the employer. I listened to the earlier testimony with much interest. I was formerly a small businessman myself, actually a member of NFIB in my other life, and I know how tough it is. Those Guard and Reserve members want things to be fair for the employers as well as for the Guardsmen. We think that fairness is possible and we think there are some special considerations for the small employers that need to be considered.

In the past, that concept has been termed "reasonableness" in the bill. We believe that your bill follows that concept very closely with only minor exceptions. In my prepared statement, we identified two areas that we would recommend changes in: the treatment of temporary hire employees and the period of absence related to priority reemployment rights. We also are concerned about the requirement for the payment of pension benefits during periods of service.

I think that as the military draws down the active duty military, there are going to be more demands upon the Guard and Reserve,

more calls for service on a short-term basis for either crises or to augment a very lean active military force. We are also in a very technical military that requires frequent additional training and retraining for members of the Guard and Reserve. If you belong to a helicopter outfit in Jacksonville, FL, that is going to be in the process of transitioning into Apache helicopters, you are going to have to go back to school, because that machine is a different world from the previous attack helicopter world. Things of this sort are going to require that Guardsmen be able to leave for short periods of time and get that training in order to maintain their competence.

We have a concern, too, about those people who go on long tours of active duty. We think you can separate those people who volunteer for a 4-year tour of active duty and those who are asking for short-term active duty to receive training that relates to their job and their unit back in their community. We think that 5 years is overly generous and overly demanding on employers. We think basically most callups for training that are for voluntary training periods would be less than 2 years, and we think that should be considered.

Mr. Chairman, we support your efforts and we're ready to answer any questions.

[The prepared statement of General Ensslin appears on page 87.]

Senator GRAHAM. Thank you, General.

Lieutenant Colonel James Rodenberg, legislative counsel for the Reserve Officers Association.

STATEMENT OF LIEUTENANT COLONEL JAMES RODENBERG, USAF (RET.), LEGISLATIVE COUNSEL, RESERVE OFFICERS ASSOCIATION

Colonel RODENBERG. Mr. Chairman and members of the Committee, on behalf of the many members of the Reserve Officers Association, representing each of the uniformed services, I want to thank you for providing me this opportunity to present the Association's views on the proposed revisions to veterans' reemployment rights legislation.

I want to commend the Committee for responding to the needs of reservists. Citizen-soldiers routinely make sacrifices as a part of their service, and left without strong reemployment protection, few would be able to continue to serve.

Reemployment rights take on a new meaning as the administration and the Congress call on reservists to play an even greater role in the Nation's defense. During Operation Desert Shield/Desert Storm, the Reserve components proved remarkably that they are responsive and effective. They brought to that war an outpouring of public support. The cost effectiveness of the Reserve components has long been recognized. But unless reservists are assured reemployment rights, the services may be unable to recruit and maintain these cost-effective forces.

Having emphasized the importance of reemployment rights, I would suggest that legislation has its limits. Statutory protections provide a foundation for the necessary cooperation of employers and employees. But statutes are no substitute for good will. In initiating this legislation, I believe this Committee was generally guided by the

83-460 O - 94 - 2

principle that veterans and reservists should be treated as if they had never left their employment. If the principle seems generous in its treatment of reservists, it is not without rationale.

Reservists provide this Nation a defense capability that it could not otherwise afford. The Guard and Reserve are good investments. Through their support of reservists, employers contribute to our Nation's defense and they enable the Government to spend fewer tax dollars on defense. By employing reservists, employers benefit in another very real way—reservists make good employees. They possess different training skills and work ethics, but more often than not, reservists are dependable, ambitious, hardworking, loyal employees. They are normally more mature and fiscally responsible. Reservists often bring to the workplace useful training and skills acquired in the military. While it is difficult to put a price tag on these attributes, many employers are well aware of the bargain that is theirs when they hire a reservist.

During the consideration of this legislation by the 102nd Congress—and we've heard it here today—there were efforts made by representatives of small business groups to exempt small business from some of the provisions, particularly provisions having to do with disabled employees and health care benefits. While ROA appreciates the concerns of the small businessmen, any small business exemption would effectively strip the bill of its effectiveness for a large number of reservists. A great many members of the Guard and Reserve are employed by small businesses, and their exemption would have a significant negative impact on recruitment and retention. The costs added by the law are a part of the price small businessmen must pay to have the skills and capabilities reservists bring to the workplace.

The ability of all reservists to elect continued health care coverage for up to 18 months is a critical provision of this legislation. Given the acute need for adequate health care and today's costs, the provision is of particular concern to many reservists. We believe that requiring the individual to pay no more than 102 percent of the full premium for the coverage when the employee is absent for more than 31 days is fair for the employer and for the employee.

Pension benefit plan contributions are also of particular interest to the association. Regarding the employer's contribution, ROA urges the Committee to again adhere to the principle that returning reservists be treated as though they had never left. Earnings should be credited with respect to an employer's contribution in the same manner and to the same extent as earnings are credited to other employees during the period of service, irrespective of when the contribution is made.

In conclusion, I want to say that we believe that this legislation generally will do much to clarify and improve uniformed services employment and reemployment law, and ROA greatly appreciates the effort that has gone into this revision.

I thank you again for this opportunity, and I will be happy to answer any questions you might have.

[The prepared statement of Colonel Rodenberg appears on page 93.]

Senator GRAHAM. Thank you very much, Colonel.

I have a limited number of questions that I would like to ask. The first really raises the philosophy behind this legislation. As I think the comments of the first panel and your comments indicate, the issue of fairness lies at the heart of this legislation. Everyone supports a program of civilian job security for men and women who have given of themselves to protect our country. Everyone realizes that civilian employers are being asked to pay a part of the cost of that servicemember's job security. The question is, what is the right balance? I would like to ask each of you to address this question particularly as it pertains to two areas in the legislation: One, the extended employer health care coverage, and two, employee pension plans. If each of you would be willing to briefly comment on those two central issues to the balance and fairness in this legislation.

Mr. Hubbard.

Mr. HUBBARD. First and foremost, we must be fair to the employee who for one reason or another finds himself or herself on active duty in the Armed Forces for some period of time. We have no problem with making that employee, as it is in the provision of the Senate bill, paying as part of their service 102 percent of the health care costs. We don't have any trouble with that at all.

As far as the pension benefits are concerned, for that period of time during which that employee finds himself or herself on active duty, that pension benefit ought to be continued on about the same basis as everybody else who was not called to active duty. That's fair.

Senator GRAHAM. Mr. Gilmer.

Mr. GILMER. Thank you. We think the extended health care provision is very important. As we pointed out in our testimony, extended health care is already available in other circumstances not related to veterans' reemployment rights. So we don't understand why that would be such an issue here. The argument that health care is already available to military personnel either directly through the military installation or CHAMPUS simply means that the people who opposed this provision are unaware of some of the limits that apply to these health care programs.

First of all, many of the medical health care programs that are available to employers are more liberal, and they also provide for the person to receive medical care directly from a particular physician. That may be critical in the case that a family member has a chronic illness. There is also the problem with the break in health care coverage, so that later on when they come back to the employer, if they have to reestablish insurance, then issues may arise regarding preexisting conditions or they may have to wait for a period of time before they are covered.

Beyond that, military service no longer provides the extensive medical benefits that it used to provide for people in the armed services or for military retirees. The fact is that military medical services are stretched thin, so that during a period in which there is a national callup of the National Guard and Reserves, there are some real problems in trying to ensure adequate health care. During the Persian Gulf War callup, in some cases, VA medical centers were depleted of a number of high-level professionals. We think that

happened a lot and affected the provision of care in military medical facilities too.

So we think that is a very unenlightened view, to simply state that those medical services are already there. We don't think they are, certainly not to the degree that the private health care may be. So for that reason, we want to see the private health care provision maintained. We believe it is a very good provision.

In terms of the employer pension, that is an area in which we have little expertise. But when we listened to the testimony of Ms. Judith Mazo with the Association of Private Pension and Welfare Plans this morning, it was interesting that, if I understood her testimony, she seemed to feel the current bill language was adequate, was something they could agree with.

Senator GRAHAM. Thank you, Mr. Gilmer.

Mr. Brinck.

Mr. BRINCK. In terms of details, I wouldn't add anything beyond what has been said. We would certainly continue to support the extended health care coverage. We covered that in our testimony. There may be some options for getting the VA involved in ensuring that service-connected problems that arise during service would be covered after release from active duty. Just thinking off the top of my head here, maybe to lessen the load on the employer's health plan, possibly some sort of copayments, along with CHAMPUS treating employer's insurance as supplemental insurance, may be an option. I don't know, but that's certainly worth a discussion.

And as far as pensions go, the employer should provide for the veteran to be made whole as if they had never departed. Let's remember that the employer is not being asked to provide anything that the employee isn't going to contribute to. This is not a one-way street.

Senator GRAHAM. Thank you.

Mr. Manhan.

Mr. MANHAN. Thank you, Mr. Chairman. The answer from the VFW is, yes, we strongly support extended health care coverage and the employee pension. I would like to add even a 401(k) entitlement. The VFW is coming from the position that the people we think your bill is trying to take care of are National Guardsmen and/or reservists, as General Ensslin and Colonel Rodenberg suggested, who must be called up periodically for refresher training and/or are federalized or nationalized for civil disasters and disturbances. So it is often a short period of time. Where these National Guardsmen or first-term military enlistees have a wife and/or children, and they come out of Lincoln, NE, as an example, we can't expect the enlisted man to move his family to his duty station or his port of embarkation for overseas. The point I am making, Mr. Chairman, is that the wife and children are already getting whatever medical treatment or coverage they have in Lincoln, NE, and they will remain there. They are going to stay home anyhow, so therefore the employee and the employer should extend the private sector health care primarily for dependents. I have heard Mr. Rush of DOD speak earlier this morning about the use of CHAMPUS. Frankly, enlisted people just do not have the time to fill out the necessary paperwork. It is a nightmare to navigate the

CHAMPUS system even if you are on active duty on a full-time basis, even now.

Yes, the employee pension is an important thing, but if you've read the front page of this morning's Washington Post, pensions may be a short-lived thing. Apparently, big firms are dumping pensions, according to this article.

Senator GRAHAM. Thank you.

General Ensslin.

General ENSSLIN. We think that the employer support of the Guard and Reserve program is vital. We want them to be enthusiastic supporters and we don't want them to feel that they are carrying more than their share of the burden of supporting the program. We think on the health care side that this is a very important issue for the reasons that have been stated—the convenience of health care to the families wherever they may be located is very important. If there is a break in your health care coverage, if you have preexisting conditions you may have difficulty getting back into the programs when you return from service. We think fairness would dictate that the employee make a contribution to the continuation of participation in that program, particularly on the family side, but it is important that people who are mobilized not have this additional burden and worry.

In the arena of pension plan contributions, we feel that the employer should protect the seniority of the individual while he is gone. I was an employee of Sears Roebuck and Company when I was drafted after about 90 days of employment. When I returned 3½ years later from active duty, it was only about 1 more year before I was moved into the B group of profit-sharing in which the company's contribution is twice what it is in the A group. Instead of waiting 5 years as I ordinarily would have, the 3 years that I was gone on active duty counted. I think that is a fair kind of proposition.

I didn't feel at the time, and don't feel now, that Sears Roebuck should have been obligated to make the contribution that they would have made if I had been there working. As it was, I was participating in a retirement program for those 3 years of active duty and now have reached sufficient age, having completed the requirements, to begin to enjoy that. Granted, not everybody is going to accumulate 20 years of military service, but I think that we have got to keep the needs of the employer in balance with the needs of the servicemember. We don't want the servicemember to be damaged by his service, but we want to make it as easy for the employer to cooperate as possible.

Senator GRAHAM. Thank you, General.

Colonel Rodenberg.

Colonel RODENBERG. Yes. You asked that we address fairness. I think obviously fairness is in the eyes of the beholder or depends on where you are standing, and I think we have to be a little bit careful in looking at it one employer at a time or one employee at a time; their interests seem contradictory in many cases. But I think if you step back, as I think the Committee has attempted to do, and look at this in terms of the contributions that reservists make to defense, some of the sacrifices they make and so on, you get a different picture

of fairness. One thing I didn't mention in my opening comments that I would mention—the Senate bill, of course, has protection for temporary employees. I am reminded of a call I received during Desert Storm from an individual who had been a temporary employee with a university for 12 years, and she was very concerned when she left to go to Desert Storm that she would have a job when she came back. I think most of us would agree 12 years of employment, even though her status was temporary, constitutes some kind of an obligation there. So I think there is a real fairness there.

In my opening comments, I tried to make very clear where we come down on health care and pensions. There are limitations to the health care that we have. I think, as was pointed out by the earlier panel here, not everybody—and indeed, only a small portion of reservists or veterans—would take advantage of the health care option because it would be expensive. But there are situations where chronic illnesses of the family make continued health care important. The problems that you can get into with CHAMPUS—and I understand that well; I go through this daily almost—the importance of their being able to spend 102 percent to cover the cost of that health coverage seems very fair to both the employer and the employee.

In terms of the pension, I perhaps come down on this harder than even some of my fellow panelists here. I can appreciate the problems of small business; indeed, I think reservists in particularly very small companies are very concerned with the well-being of that company too, and I would hope that for that reason alone they would not take advantage of it. But having said that, I think there is a real concern. There are times, the way the House bill is written, when employers would have to dig into their own pockets and come up with money, and that may seem unfair. But if you don't have that kind of protection, the other side of that is that the individual called up for Desert Storm for 90 days or 180 days or however long it might have been—that employer could have taken that money that would have been some of the interest and some of the investment that would have gone on, and pocketed that or turned it right back into the business. So I think there is some fairness in the way the House bill is written.

Senator GRAHAM. Thank you very much, Colonel.

I have one last question. I would suggest since this has been touched on by several of you, that you might be able to give a fairly concise answer, and that is, from what, if any, part of the VRR law do you believe small employers should be exempt, and why.

Mr. HUBBARD. None.

Senator GRAHAM. None? OK.

Mr. Gilmer?

Mr. GILMER. We believe they are currently covered under the law, they've always been covered under the law, we don't see any need to change that. Thank you.

Mr. BRINCK. We would concur in that.

Mr. MANHAN. The VFW would like to see the temporary employees eliminated for the small business persons only because employment today is not what it was four or five decades ago. It is very expensive

to hire people; perhaps the single most expensive item of most firm's payroll is people.

Senator GRAHAM. General?

General ENSSLIN. I would not exempt small business from the provisions where they are in a program. Some of them don't have pension funds and I think there needs to be some examination of the differences in that small employer, and I am talking about 20 or less, rather than 50 or less. I think the payment of pension benefits by the employer while the employee is gone is something that I think should be eliminated for everybody.

Senator GRAHAM. Colonel?

Colonel RODENBERG. I think many here have already answered that question very well. I think to exempt small business for many employees would gut the whole VRR law as we have known it. I don't think the exemptions can be made and still have a credible piece of legislation.

Senator GRAHAM. Thank you, gentlemen. I appreciate your very helpful comments. Senator Rockefeller has indicated that it is his hope and intention to mark up this legislation early next month. Your assistance today as well as that of the members of the first panel has been very helpful in bringing us to this point.

I have asked Mr. Moseman if he has any questions and he has indicated that he might have a few questions to ask for written response. So, reserving the possibility of such requests for written response, there are no further questions. Thank you all very much for your participation.

Senator GRAHAM. This hearing stands adjourned.

[Whereupon, at 12:05 p.m., the Committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

PREPARED STATEMENT OF CHAIRMAN JOHN D. ROCKEFELLER IV

The men and women who serve our country in the military face not only the risk of battle, but often have major disruptions of their personal lives back home. One small protection we have provided to those who serve, and have afforded their brothers and sisters to varying degrees since 1940, is the right to return to their old jobs in pretty much the same capacity as when they left to serve their country. Quite honestly, it is the least we can do.

Over the years, these job protections have evolved into a patchwork of not always consistent or clear policies known as veterans reemployment rights (VRR). There is now widespread agreement that the hodgepodge of VRR laws, regulations, and varying interpretations need repair. That's why we're here.

On April 29, the Committee's ranking Republican, Senator Murkowski, and I were joined by Senators DeConcini, Graham, Akaka, Daschle, and Campbell in introducing S. 843, the Uniformed Services Employment and Reemployment Act of 1993. The House passed a similar bill, H.R. 995, last week. Both bills would clarify and make improvements to the VRR law.

Generally, the VRR law entitles individuals who serve in the military to return to their former civilian jobs without loss of seniority, status, or pay. The law is intended to remove barriers to noncareer military service by providing job security to employees who leave their civilian jobs to enter active duty, voluntarily or involuntarily. Both the House bill and our bill would help ensure that the VRR law effectively and fairly serves this purpose.

Nearly 6 years ago the administration, recognizing the need to revise the VRR law, organized an interagency task force and spent 3 years developing what was to be the forerunner of S. 843. Two members of that task force—the Departments of Labor and Defense—are represented on our first panel today.

In the 102nd Congress, both the House and Senate passed separate VRR bills derived from the task force proposal. However, there was

not enough time to negotiate with the House on the complicated issues of VRR, so we revisit the issues today.

Two of the business organizations with which our Committee worked in a strong bipartisan effort last year to craft an acceptable bill are also on today's first panel. Together with the federal administrators, they will identify the primary issues and discuss the areas of conflict.

Our second panel will represent the employee/service member. The panel is composed of representatives from veterans service organizations, the Reserves, and the National Guard. I am pleased to have our panelists with us today and look forward to hearing their testimony on this most important matter.

PREPARED STATEMENT OF SENATOR FRANK H. MURKOWSKI

Good morning, Mr. Chairman. It is a pleasure to be here this morning to consider this important piece of legislation.

We have often discussed our desire to approach the business of this Committee on a nonpartisan basis. It seems to me, Mr. Chairman, that this bill is a prime example of the ability of the members of this Committee on both sides of the aisle to work together toward a common goal. Working together, we have put together a sensible piece of legislation which protects those who return from active service without unfairly burdening the employers to whom they will return for work. Is it perfect? I expect it's not entirely perfect, and I look forward to constructive testimony on how this bill might be improved. But it's a heck of a good start.

Judging from what I have seen and heard so far on this fairly complicated issue, it seems to me that the Senate bill is far superior to the one recently reported by the House Veterans Committee. I must say that I am very encouraged that some of our VSO witnesses have taken positions which favor our bill even though certain provisions are in some ways less generous to the returning veteran than the House bill. If we all adopt this spirit of constructive comment, I know we will be able to resolve our differences with the House and accomplish this long overdue update in the law.

That said, Mr. Chairman, I look forward to hearing our witness' comments, and I thank them for their fine comments.

PREPARED STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman: It is a pleasure to be here today to receive testimony on S. 843, the Uniformed Services Employment and Reemployment Rights Act of 1993. I want to commend you, Mr. Chairman, and the distinguished ranking minority member, Senator Murkowski, for scheduling this hearing on this important issue. I would also like to welcome our distinguished panels. This Committee appreciates your dedication to all veterans, and we value the contribution of your knowledge and expertise.

S. 843 would update and recodify veterans' reemployment rights law. It would revise Federal veterans' benefit provisions relating to employment and reemployment rights of members of the armed forces returning to Federal, State, or private employment after being honorably discharged from the armed forces or becoming disabled while serving in the armed forces. This will provide job security to those who serve our Nation in time of need.

Mr. Chairman, my commitment to the veterans of our armed services remains strong. As we consider this legislation, we must ensure that we are providing appropriate protection to our veterans, while ensuring a level of fairness to both employee and employer.

The hearing today will certainly provide us with valuable insight into making the necessary improvements in veterans' reemployment rights legislation. I look forward to reviewing the testimony.

PREPARED STATEMENT OF FRANCIS M. RUSH, JR., PRINCIPAL DIRECTOR, MANAGEMENT AND PERSONNEL, OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS, U.S. DEPARTMENT OF DEFENSE

Mr. Chairman and Members of the Committee: I am very pleased to appear before you today to discuss S. 843, which would amend chapter 43 of title 38, United States Code, involving the employment and reemployment rights of military veterans.

The fundamental right protected by the provisions of chapter 43 is the right of reinstatement to employment following military service, including protection of seniority, status, and rate of pay. Statutory employment protections for members of the armed forces were first enacted just prior to the Second World War. Provisions extending employment protections to cover training in the reserve components were added in 1951. Other important provisions affecting reservists were added in 1960. In 1968, additional protection was adopted to prohibit discharge from employment or denial of promotion or other incidents of employment, because of an individual's membership in a reserve component. An important provision prohibiting discrimination against reservists in the hiring process was added in 1986.

These statutory provisions are of immense importance to the Department of Defense generally and to members of the uniformed services in particular. They are especially important to members of the National Guard and Reserve. Over 80 percent of the enlisted members of the Selected Reserve and nearly 90 percent of the officers are employed in the civilian sector. Both reservists and their employers need to clearly understand their rights and obligations when reservist employees are away from the workplace due to the training and service obligations inherent in their military status.

The progressive piecemeal changes which have been made to the current Veterans' Reemployment Rights (VRR) statute, changing circumstances and requirements associated with military duty, and new laws and practices covering pension plans and health benefits,

have made the current statute complex and difficult to interpret. To the extent that ambiguities exist, they have potentially serious consequences with respect to the rights provided by the statute.

The unanimous opinion of the U.S. Supreme Court on December 16, 1991, in William "Sky" King v. St. Vincent's Hospital, which held that the existing VRR statute places no limit on the length of training after which a reservist can enforce his or her reemployment rights, resolved one such ambiguity. The issue in question had been decided differently by the federal circuit courts of appeals. Absent a thorough revision of the statute, many ambiguities will remain.

Recognizing that progressive changes in the statute coupled with changing circumstances of military duty have resulted in a law which needs comprehensive revision, an Interagency Committee was formed in 1987 to review the current law and to recommend legislative changes. Representatives from the Departments of Defense, Labor, Justice, Veterans Affairs and the Office of Personnel Management and, more recently, the Office of Special Counsel, joined in the effort. Proposed legislation, based on the recommendations of the Interagency Committee, was forwarded to the Congress in March of 1991.

Much thought and effort on the part of this Committee, the House Veterans' Affairs Committee, and agencies of the executive branch since that time have further perfected this legislation. H.R. 995, which is in substantial part identical to S. 843, passed the House of Representatives last week. The Department of Defense greatly appreciates the continuing dedication of this Committee, Mr. Chairman, in improving this legislation and moving it forward.

While my position is in the Office of the Assistant Secretary of Defense for Reserve Affairs, I would stress that this legislation would apply to all members of uniformed services who return to civilian life after military duty or training, not just to reservists. In the AlAll Volunteer Forc era, however, the employment and reemployment protections afforded members of the National Guard and Reserve under the statute have become even more important. The Department of Labor tells us that the great majority of the cases which it handles involve reservists. Moreover, the cases involving reservists are among the most complex.

In considering these matters, Congress has concluded that "the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." We agree that the enthusiastic voluntary cooperation and support of employers is critically important to successful reserve programs. We also are convinced that statutory protections and an enforcement mechanism form a necessary foundation for this cooperation.

It was for the purpose of fostering cooperation, understanding, and voluntary support by employers of their employee-reservists that the National Committee for Employer Support of the Guard and Reserve, an agency within the Office of the Assistant Secretary of Defense for

Reserve Affairs, was originally established in 1971. Through effective communication of the role and importance of reserve forces within the Total Force, we believe that we can gain the support of employers in establishing personnel policies and practices that will encourage, or at least not obstruct, participation by their employees in reserve programs.

The National Committee is a grass roots organization that supports state-level Employer Support Committees, involving some 4,000 volunteers who are influential members of local business, labor, and professional communities in 55 state, territory, District of Columbia, and Commonwealth of Puerto Rico committees. The National Committee develops public information programs, including television and radio spots which are directed at employers, supervisors and the public to increase the understanding of the role of National Guardsmen and Reservists in the Total Force and the importance of military training time. The Committee establishes contacts with professional, business, and labor associations and seeks to obtain official statements of support from associations and their member firms.

The National Committee also works, through its highly regarded ombudsman organization, to foster understanding of the legal rights and obligations of both reservists and their employers. In addition to full-time ombudsmen on the national staff, volunteer civilian members of the National Committee in the individual states are trained to answer questions about employer-related matters. Difficult or complex questions are referred the national staff or to representatives of the Department of Labor.

The great majority of employers want to do what is right and are supportive of their employee-reservists who join and serve in the Armed Forces. During Operations DESERT SHIELD/STORM, many employers went far beyond what the law requires in support of their employee-reservists who had been activated. The proposed statute that we are discussing would serve as an important reference point for such support.

Permit me to briefly outline what we believe to be some of the most important features of the proposal. First, it would eliminate distinctions in the protections offered under the law based on categories of persons or types of duty. Many of the existing distinctions are no longer warranted, nor are they relevant to the employment relationship. Under existing law, for example, those persons who enter active duty for a period of less than four years have 90 days within which to apply for reinstatement with their former employer. Reservists entering training duty (other than initial active duty for training in excess of 12 consecutive weeks), must report for work at the next scheduled work period after their return. Those who perform initial active duty in excess of 12 weeks or are ordered to active duty under section 673b of title 10, United States Code, for any period of time, have 31 days within which to apply for reemployment.

These distinctions are unlikely to be of concern to employers. The most significant factor to an employer is the length of time the

employee is absent. Under both S. 843 and H.R. 995, the time period that the returning servicemember will have in which to report to his or her pre-service employer will depend upon the duration of the service or training. For example, a member whose service was for fewer than 31 days would be required to report to work on the first day after completion of the service. If the service was 181 days or more, the member would have up to 90 days to request reemployment and report for work. This will be easier to understand and apply.

Second, both S. 843 and H.R. 995 would expressly provide that the timing, frequency, or duration of training or service, or the voluntary or involuntary nature of that training or service, would not be a basis for denying protection under the statute. This is much more explicit than current law but, as the Supreme Court has held, it is fully consistent with that law. It is self evident that, when a reservist complies with orders to military training or other duty, the reservist must know with certainty that the legitimacy of the orders will not be questioned.

Both S. 843 and H.R. 995 would revise and clarify the existing statutory provisions covering federal employees. We agree that clarification and modernization are needed. Both bills would reiterate that the reemployment obligation applies to the federal government just as it applies to any other employer and include a sense of Congress provision that the federal government should be a model employer with respect to the purposes and policies set out in the employment rights law for members of the uniformed services.

The final feature included in both S. 843 and H.R. 995 which I would mention is the explicit treatment of health and pension benefits. The importance of these benefits has greatly increased since the last major revision to the Veterans' Reemployment Rights statute. During this period of time, other federal laws, such as the Employee Retirement Income Security Act (ERISA) and the Consolidated Omnibus Budget Reconciliation Act (COBRA), have been enacted. There is no question that clear and reasonable rules relating to these benefits is needed.

In summary, Mr. Chairman, we believe that S. 843, which you introduced last month, is consistent with the objectives which the Interagency Committee had in mind nearly six years ago. The Department of Defense is convinced that the provisions of this legislation will improve and clarify the important protections afforded by the statute for those citizen-soldiers, sailors, marines, airmen, and Coast Guardsmen who will continue to be a critically important part of the Total Force in the future.

PREPARED STATEMENT OF HARY PUENTE-DUANY, DIRECTOR, OFFICE OF VETERANS' EMPLOYMENT, REEMPLOYMENT, AND TRAINING, U.S. DEPARTMENT OF LABOR

Mr. Chairman and distinguished members: Thank you for the opportunity to present testimony on S. 843, the Uniformed Services Employment and Reemployment Rights Act of 1993 (USERRA). We

support the Committee's effort and recognize your commitment toward strengthening the veterans' reemployment rights program through this bill. As you are aware, a similar bill, H.R. 995, was recently passed by the House with Administration support. During my testimony I will make reference to, and discuss certain provisions of, both bills.

The citizen soldier is an American tradition. Throughout our history, Americans have left their civilian pursuits to defend the Nation and the principles of liberty and justice we cherish. During Operation Desert Shield/Storm over 269,000 men and women of the Reserve and National Guard were called to active duty to respond to an act of aggression by Iraq. In lesser numbers Reservists and Guard members have been instrumental to the relief efforts following Hurricane Andrew, the protection of life and property during riots in Los Angeles, the war on drugs, the humanitarian effort in Somalia, and the relief airlifts to Bosnia.

Not since our Nation's founding have we been so dependent on the citizen soldier. Under the Total Force Policy, adopted by the Department of Defense in 1973 and recently validated by Operation Desert Shield/Storm, our country relies upon the readiness of the Reserve components to maintain the required defense posture. An essential element of readiness is participation in the training necessary to maintain and enhance military skills. Reserve component personnel are unlikely to be willing to participate in such training, or continue their service in the Reserve components, unless they can be offered reasonable assurances that they will not suffer harm with respect to their civilian jobs and careers. For this reason, the effective enforcement of reemployment rights is more important than ever before.

Since 1940, the Veterans' Reemployment Rights Act (VRR) has protected employees who leave civilian jobs for voluntary or involuntary military service. Initially, the law was written as a part of our Nation's first peacetime draft law and applied to those who were involuntarily called to service. Almost immediately the law was amended to include protection for those who volunteered for service or were activated from the National Guard. Upon completion of military service, whether voluntary or involuntary, those individuals were entitled to return to their previous civilian jobs or similar jobs, with their preservice employer, with the precise seniority, status, and rate of pay they would have obtained had they remained continuously employed; this fundamental concept of the VRR statute is referred to as the "escalator principle." Over the years the law has been further amended to give Reservists and National Guard members protection in their civilian employment while they participate in military training, and to protect them from discharge or discrimination in employment because of their military obligations. In 1974, the law was amended to provide the same protection to employees of States and their political subdivisions as is provided to employees in the private and Federal sectors.

The philosophy behind VRR is simple and straightforward: Those who serve our Nation have earned the right to return to their civilian

positions without penalty or delay. Even before Operation Desert Shield/Storm required activating large numbers of Reserve and National Guard personnel, it had become evident, however, that the present VRR law is a confusing and cumbersome patchwork of statutory amendments and judicial constructions, including 16 Supreme Court decisions and hundreds of Circuit Court decisions. This complexity hampers the Department of Labor's (DOL) ability to resolve quickly the claims of returning servicemembers and to provide to the public complete and easily understandable information concerning the rights and obligations of employers and servicemembers.

Mr. Chairman, we are pleased that the Committee has proposed legislation which will simplify and clarify the VRR law while retaining and continuing the basic focus and rights of the current law. At this time, the Department strongly supports the enactment of most of the provisions contained in S. 843. However, we are still reviewing the pension-related provisions of the bill, which raise serious issues that have not been fully assessed. In addition, although we generally support the concept of maximum health insurance coverage for employees, we defer our views on the health care provisions until the work of the health care reform task force has been completed and the Administration has submitted its proposals to the Congress.

S. 843, like H.R. 995:

- reinforces the "escalator principle";
- eliminates the distinction among categories of military service such as "active duty," "active duty for training," and "initial active duty for training." Instead, both substitute "duration of service" as the basis for eligibility and entitlement;
- establishes time limits for reporting back to work or requesting reemployment after service based on duration of service rather than on type of service;
- requires that advance notice be provided prior to departure for all types of duty;
- provides State and private sector employees consideration for representation by the Attorney General for any violations, and provide Federal employees consideration for representation by the Office of Special Counsel before the Merit System Protection Board. (Under the current law, persons employed by States or private employers may be represented by a United States attorney, but Federal employees have no similar statutory right to representation in the process.);
- requires the Secretary to investigate allegations of violations of the law, and provide subpoena authority to the Secretary;
- outlaws employer reprisals against claimants and others who provide evidence during an investigation under the law;

- requires that employers make contributions upon servicemembers' return to defined contribution plans for periods when employees are absent performing service;
- allows all employees covered by employer sponsored health plans to continue that coverage when departing for service;
- continues the principle of universal coverage with no distinction as to the size of the employer or between voluntary and involuntary service.

There are also a number of differences between the Senate and House versions of USERRA. As I discuss some of these differences it is important to point out that we feel that it is crucial to ensure the new legislation does not harm servicemembers by the loss of protection enjoyed under the current VRR law. We also feel it important to ensure that employers are not burdened with unaffordable requirements. In this regard, we support the continuation of providing benefits only to "other than temporary" employees, as discussed in an attached position paper.

A basic precept of the VRR law from its inception has been universality of coverage. There has never been a time when any group was intentionally left unprotected with respect to civilian employment. As employment and national security circumstances have changed, the statute has developed by legislation and court decisions to ensure that this nation has a viable military force comprised of citizen soldiers who can serve without fear of being harmed in their civilian careers while in service to the Nation.

It is in this spirit of universality of the law that the Administration supports the inclusion of protection for U.S. citizens employed by American companies operating overseas. In this same spirit the Administration supports amending the bill to include Merchant Mariners and the commissioned corps of the National Oceanic and Atmospheric Administration as protected groups within the uniformed services. We also encourage you to include language in the bill that will ensure that employees of Native American Tribes enjoy the same protection as employees of other employers. I have attached to my testimony discussion papers further addressing these issues.

As I mentioned earlier, while we support maximum health insurance coverage for individuals performing service, we defer our views on the provisions pertaining to the continuation of employer-sponsored health care until the Administration presents its proposals to the Congress. Nevertheless, it may be useful to address some of the similarities and differences between the bills.

Both bills allow employees who are participating in employer-sponsored health plans to continue that coverage upon departure for service if they so request. If the employer provides continuation of health coverage to employees on other types of absences, the individual departing for service shares the costs to the same extent that employees on other types of absences do so. If the employer does not allow employees on other types of absences to continue coverage, both bills require that the departing servicemember pay the cost.

Under the House bill the employee bears the full cost of the continuation of coverage, while under the Senate bill the servicemember's cost is limited to 102% of the full premium. Neither bill will require any employer which does not now do so to provide a health plan for its employees. Nor will either bill provide employer sponsored health plan coverage to any employee not otherwise eligible.

A cost analysis of the impact of the pension provisions of S. 843 on employers is being developed but has not been completed. Therefore, the Department is withholding support for specific pension-related provisions until a cost analysis is completed. Again, however, it may be useful to address some of the similarities and differences between the bills.

Both bills require that employers make contributions to pension plans for the period an individual is absent performing service. Both bills provide that a returning servicemember can contribute no more to the pension plan than would have been contributed had the individual remained continuously employed. S. 843 applies the "escalator principle" to the computation of contributions by requiring that contributions be based on the salary the individual would have received but for the absence in the service. H.R. 995 requires that contributions be computed on the individual's salary immediately prior to service without taking account of any changes in compensation that would have occurred had the individual not been absent.

The Senate bill further provides that the employer contributions and matches are limited to the amount that would have been contributed had the employee not been absent for service. As to the actual contributions to be made by the employer, the House bill, unlike the Senate bill, requires the employer to make certain types of payments to the plan to enable the plan to put the returning servicemember in the position the servicemember would have been in had the servicemember remained continuously employed.

The Senate bill also provides that no payments are required to be made by an employer for an employee who is not reemployed. This appears to be unnecessary, as nothing in either bill requires any pension payments to be made prior to reemployment of the servicemember. As to the time in which a returning servicemember must make up missed payments to a pension plan, both bills are similar in that they provide for a reasonable period that is mutually agreeable. However, the Senate bill assures the returning servicemember of a period at least equal to the time spent performing service. The Senate bill also includes a provision that bars any action that would cause the plan, participant, or employer to suffer adverse tax or other consequences under the Internal Revenue Code of 1986. It should be noted that if the pension provisions in the Senate and House bills are to have meaning, the Internal Revenue Code must be appropriately amended.

Finally, with respect to pension issues, we note that in the Statement of Administration Policy on H.R. 995, the Office of Management and Budget reported the preliminary estimate that pay-as-you-go costs to the Federal government were zero. In its report on

H.R. 995, the Congressional Budget Office stated that the cost of providing pension coverage for the estimated 6,800 Federal employees covered by the Federal Employee Retirement System called up for Operation Desert Shield/Storm would be approximately $1,000,000 per year for two years.

Turning to other issues, both S. 843 and H.R. 995 allow an employee to use accrued vacation while performing military service. To the extent that the language expressly limits the use of vacation to that accrued at the beginning of the performance of service, the Senate language is preferred. In either case, except to the extent that employees on other types of absences continue to accrue vacation, no vacation accrual is afforded under either bill for individuals absent due to duty in the uniformed services.

S. 843 limits an employer's requirement to provide rights or benefits to a person deemed to be on furlough or leave of absence to the shorter of 18 months or the duration of service. Current law entitles a person to participate in insurance or other benefits offered by the employer to the extent that they are offered to other employees on furlough or leave of absence. Both the House and Senate bills provide that an employer not delay the reemployment of a returning servicemember due to the lack of documentation. However, the Senate bill allows an employer to require appropriate documentation before granting pension credit to an employee who has been absent 90 or more days performing service. This will protect the employer from contributing money to an ineligible individual's pension account that once paid might be difficult to recover. This provision would impose no significant hardship on the servicemember, especially since both versions of the bill allow the Secretary to prescribe by regulation what shall constitute proper documentation.

S. 843, in sections 4315 and 4324, would provide special treatment for Federal intelligence agencies and exempt VRR decisions made by those agencies from judicial review. The House bill is silent on this matter. The Administration is reviewing the effects of these alternative policies. The Department of Labor is working with the intelligence agencies to develop a position.

Another issue pertaining to Federal employees on which the bills differ is the representation provided by the Office of Special Counsel (OSC) in pursuit of rights under this law. H.R. 995 does not allow for OSC representation on appeal before the courts in the event of an adverse decision by MSPB. S. 843 does allow for OSC representation before the courts in the event of an adverse decision by MSPB, provided that the individual was represented by OSC before the MSPB. We recognize that Federal employees need adequate representation in pursuing cases before the Federal Circuit. However, the Department of Justice has raised a serious concern with the Senate provisions, because the Federal Government would be representing before the Federal Circuit both the complainant and the agency against which the complaint was filed. We understand that the Department of Justice is preparing a report to the Committee addressing this concern.

On the other issues pertaining only to Federal employees we defer to the Office of Personnel Management and the Federal Retirement Thrift Investment Board.

We prefer the reporting requirements contained in the Senate bill. Under the requirement of 38 U.S.C. 4107, an annual report is currently provided to the Congress that includes the information requested by the House bill. We would prefer to continue to provide a single annual report to Congress, rather than create a requirement for a second annual report. We have no objection to providing the one-time report on the implementation of USERRA required by the Senate bill.

This concludes my testimony. I am accompanied today by Susan M. Webman, Counsel, Office of the Solicitor, U.S. Department of Labor. At this time we will be happy to answer any questions you might have.

ATTACHMENTS, as stated:

Coverage of Native American Tribes

Existing Law:

Coverage is not specifically codified in the VRR law. The question of coverage for Native American Tribes under VRR has not been adjudicated.

S. 843:

Coverage is not specifically codified in the bill. Section 4303(4) defines the term "employer" to mean "any person, institution, organization or other entity that pays salaries or wages for work performed ..." and would serve as the legal basis for coverage.

Suggested Alternative Language:

In order to assure that Native American Tribes are covered under the term "employer," the following language should be added at the appropriate place in the bill:

This definition includes Native American tribes and their business enterprises.

Source of Alternative Language:

USERRA Interagency Task Force

Discussion:

The Department of Labor is handling an increasing number of reemployment claims where Native American employers claim tribal sovereign immunity against the application of the current VRR law.

The general rule is that "a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Comm. v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). The rule does not apply, however, where the interest sought to be affected concerns exclusive rights of self-governance in purely intramural matters or

where the statute would abrogate rights guaranteed by treaty (tribal sovereign immunity). *See, e.g., Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). In such cases, a statute will apply to Native Americans if Congress evidences a clear and plain intent that it do so. *See, e.g. EEOC v. Fond du Lac Heavy Equipment and Const. Co.*, 986 F.2d 246 (8th Cir. 1993).

S. 843 would apply to "any person who is absent from a position of employment by reason of service in the uniformed services ... ' and to "any person, institution, organization, or other entity that pays salary or wages ... or that has control over employment opportunities ...." Sections 4312(a), 4303(4) (A). Thus, the fundamental principle of the bill, as expressed in these provisions and in section 4301 as well, is universal coverage. Given the national security concerns underlying the current law and the proposed USERRA, and in order to dispel any doubt as to USERRA's universal coverage, the suggested language should be incorporated in sectional analysis. This would avoid problems of interpretation that have arisen where Congress has been silent on the issue. *See, e.g., EEOC v. Fond du Lac Heavy Equipment and Const. Co.*, 986 F.2d 246 (8th Cir. 1993).

Coverage for Merchant Mariners and Members of the National Oceanic and Atmospheric Administration

Existing Law:

There are no provisions of coverage under the VRR law for Merchant Mariners or members of the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA).

S. 843:

Although section 4303(16) covers "any other category of persons designated by the President in time or war or emergency," there is no specific provision for coverage of Merchant Mariners or members of the NOAA commissioned corps.

Suggested Alternative Language:

The definition of "uniformed services" at section 4303(16) should state as follows:

The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the National Oceanic and Atmospheric Administration, the commissioned corps of the Public Health Service, the Merchant Marine during time of war, armed conflict, national emergency or maritime mobilization when deemed necessary by the Secretary of Defense in the interest of national defense, and any other category of persons designated by the President in time of war or national emergency.

Source of Alternative Language:

H.R. 1578, 102nd Congress, 1st Sess., section 4303(14) (1991)

Discussion:

The Administration has considered that, in general, Merchant Mariners were readily willing to crew cargo vessels utilized during Operation Desert Shield/Storm without the guarantee of current VRR reemployment rights. The Administration also has considered that it is possible under section 4303(16) for Merchant Mariners to be covered during a time of war or national emergency if the President so designates.

We believe, however, that section 4303(16) of the bill should specifically address coverage of Merchant Mariners during times of war, armed conflict, national emergency or maritime mobilization. During military operations, armed conflicts or national emergencies, such as Operation Desert Shield/Storm, Merchant Mariners crew the cargo vessels that are necessary for the transportation of military equipment. The participation of many Merchant Mariners during such operations or emergencies is similar to that of Reservists to the extent that many Merchant Mariners leave civilian jobs for a brief period to participate in military operations.

In addition, it is essential to military operations and national emergencies that Merchant Mariners begin preparing for the transportation of military equipment at the earliest stages of an operation or emergency. It is also crucial to have Merchant Mariners available to re-transport military equipment back home after an operation or emergency is completed. For example, in Operation Desert Shield/Storm, Merchant Mariners began participating well before there was a Presidential call up for Reservists to active duty, and Merchant Mariners continued to retransport equipment well after Reservists had returned home to their civilian jobs.

It is important, therefore, that Merchant Mariners who participate in military operations or national emergencies receive the same reemployment rights as Reservists and that the designation of USERRA coverage for Merchant Mariners can be made in a very expedient manner. Further, coverage should include the entire period that Merchant Mariners assist in a military operation or emergency. Providing the Department of Defense with the authority to determine when Merchant Mariners are covered allows for an expedient designation of coverage that can be applicable for the entire period of Merchant Marine assistance.

Moreover, H.R. 1109, which the House passed on March 16, 1993 and which was referred to the Senate Committee on Commerce, Science and Transportation on March 18, 1993, proposes to amend Title III of the Merchant Marine Act of 1936, 46 U.S.C. App. 1131, to extend reemployment rights under current VRR law to Merchant Mariners who are employed in the activation or operation of a vessel that is in the National Defense Reserve Fleet or that is used by the U.S. for a war, armed conflict, national emergency, or maritime mobilization. Inasmuch as H.R. 1109 proposes to use current VRR law as the statutory framework for providing reemployment rights to Merchant Mariners, we strongly believe that the more appropriate manner in which to address such coverage is under S. 843.

With regard to coverage of members of the NOAA commissioned corps, the Administration has considered that most of NOAA's 400 commissioned corps employees start employment with NOAA directly after college. The Administration also has considered that NOAA has only a small need for trained individuals who otherwise are employed in civilian jobs during military operations or national emergencies. It is important, however, for NOAA members to be included under section 4303(16) because NOAA is a uniformed service and, in keeping with the principle of universal coverage, its members should be treated the same under the proposed USERRA as all other members of the other uniformed services. NOAA already receives other benefits provided to the military. Further, coverage would not be a major burden in view of the NOAA commissioned corps' relatively small numbers.

Coverage of Temporary Positions

Existing Law:

Section 4301 provides VRR coverage for those who leave an other than temporary position of employment.

S. 843:

Section 4312 provides coverage of all positions, including temporary positions.

Suggested Alternative Language:

Section 4312(a) should be amended in pertinent part to read:

> * * * any person who is absent from a position of employment (other than a temporary position) by reason of service in the uniformed services * * *

A definition of the term "other than a temporary position" should be added to Section 4303 at the appropriate place to read:

> The term "other than a temporary position" means a position of employment which is not casual, brief, or nonrecurrent, and as to which there is a reasonable expectation that it will continue for a significant or indefinite period of time.

Source of Alternative Language:

Veterans' Reemployment Rights Handbook, 1988 Edition, Chapter 3; Legal Guide and Case Digest, 2d Edition, Section 3.2

Discussion:

The purpose of Congress in making a distinction between temporary and other than temporary positions in the existing law was to relieve the employer from the obligation of creating an unneeded position in order to employ a returning servicemember who held a position meeting a temporary need before military service. 86 Cong. Rec. 11,030 (1940).

A general purpose of the proposed USERRA is to preserve and clarify the existing VRR law. The existing VRR case law is well settled concerning what constitutes "other than a temporary position." The suggested alternative language preserves the existing case law and further clarifies the term by definition. It also avoids unforeseen problems that may arise through coverage of temporary positions.

PREPARED STATEMENT OF JUDITH F. MAZO, SENIOR VICE PRESIDENT, THE SEGAL COMPANY, REPRESENTING THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS

Mr. Chairman and Members of the Committee, the Association of Private Pension and Welfare Plans ("APPWP") is pleased to have the opportunity to testify at this hearing. As you requested, our comments address both S.843, as introduced on April 29, 1993, and H.R. 995, as passed by the House of Representatives. Our comments will focus on the impact of these bills on employee benefits.

The APPWP is a non-profit organization founded in 1967 to protect and foster the growth of this country's private employer sponsored employee benefits system. The APPWP membership includes both large and small plan sponsors, as well as actuarial and consulting firms, insurance companies, banks, investment firms and other firms which provide support functions for plan sponsors. Collectively, the more than 400 members of APPWP have substantial experience in the entire spectrum of issues relating to all types of benefit plans and sponsor or administer plans covering over 100 million people.

Introduction

The stated purpose of S. 843 and H.R. 995 is to encourage noncareer service in the uniformed services of the United States and to minimize the disruption such service causes on employees, employers and the community. This is a laudable goal. The APPWP supports the concept of ensuring that persons serving in the uniformed services and their dependents have adequate coverage. The plan sponsor members of APPWP have generally provided significant levels of benefits to employees serving in the military.

We are gratified that the goals of the proposed legislation include minimizing the disruption incurred by employers whose employees leave employment to serve in the uniformed services. It is important to remember that the health of the employer sponsored benefits system in this country depends, in large part, on the flexibility employers have to design benefits which satisfy the diversified needs of their employees. We believe strongly that the voluntary nature of the private employee benefits system and the flexibility allowed employers to design benefits have led to greater benefits for all employees, including those who serve in the uniformed services.

We worked diligently with the Senate Veterans' Affairs Committee staff during the 102nd Congress to resolve issues and concerns raised by S. 1095, last year's bill, which was very similar to that proposed this year. We were gratified that, together, we were able to find solutions to many of the issues which concerned us. Based on the changes made to the bill we supported the October 1, 1992 version of the Senate bill.

S. 843

Many of the changes we worked out with the Senate Veterans' Affairs Committee staff are included in S. 843, this years bill. However, there were several modifications to last year's bill which were not included in the proposed bill. We have included a list of these along with a description of each of them in an attachment of recommended technical corrections to the S. 843. We strongly urge the Veterans' Affairs Committee to make the suggested changes. We believe that with the corrections noted in the attachment, the bill will be sufficiently workable for employer-sponsored plans. In the event the changes are made we would support the bill.

Specifically, we would like to call to the attention of the Committee the following three issues: extension of the "most favorable" benefit available to individuals on uniformed services leave, exclusions in life insurance and disability insurance plans of military related death, injuries and conditions and the reduction in the 18 month cap for certain individuals who leave employment to serve in the uniformed services. The Senate bill contains a provision which will require employers to provide the most favorable benefits they have available for any person on leave to individuals who are on military leave. This is a significant shift in cost from the public sector to the private sector employers who happen to have employees serving in the uniformed services. However, we recognize that the goal of this legislation is to protect the rights of and prevent the discrimination against individuals who choose to serve in the uniformed services. Although the goal is laudable and certainly supportable, the language of the proposed bill gives us concern.

It can be interpreted to entitle individuals on uniformed services leave to better benefits than they would have had if they had remained employed. In its attempt to preclude any discrimination, it has eliminated employer flexibility in designing benefits which satisfy differing needs of employees based on the reasons for the respective leave of absences. Last year we worked with the Committee staff to find an appropriate solution to this problem and agreed upon including a provision which would limit the benefits to those "generally" provided and except from the types of leave "generally" provided, those benefits provided to employees by reason of special circumstance relating to the occurrence of an event affecting the health of the employee or a member of the employee's family. We still believe that such a provision would go a long way to alleviating concerns expressed by employers that the broad language of the bill inhibits them from effectively designing benefits which may vary due to the reason of the leave.

However, we believe an alternative approach may better serve both the needs of employers and ensure that the anti discrimination goals of the Committee are met. We would still urge the inclusion of the word "generally" to describe the benefits to be provided. We would also urge an exception for leaves that are mandated by federal, state and local law, such as jury duty and family or medical leave, or by a collective bargaining agreement. Collective bargaining agreements are not manipulable by the employer, and requiring the employer to top everyone

else to the level negotiated by the union will put severe pressure on the collective bargaining process since it gives the employer the incentive to resist union demands for paid leave, personal days, etc. for reasons unrelated to the bargaining unit employees or the cost of the benefit for them. We also believe there should be an exception for short term leaves such as bereavement leave, sick leave, personal days, etc. where the employee may be kept on the rolls because its simpler and cheaper than taking them off and putting them back on again. Clarification is needed that the continuation of paid leave in the case of certain leaves would not require that same benefit to those on military leave. This would include bonuses.

We also assume that the bill does not require comparability with every special arrangement worked out with the individual employees on an ad hoc basis as they go on leave, such as making in-home computers and other telecommuting equipment available to a skilled employee on maternity leave, continuing pay or benefits for an individual who agrees, under pressure by the employer, to go for alcoholism or substance abuse treatment, or other arrangements tailored to a particular employee's needs and the employer's special need to retain or rehabilitate that employee, since the comparability rule only applies to leaves or furloughs established pursuant to a "practice, policy, agreement or plan."

We urge the Committee to include in the bill a provision which was included in the October 1, 1992 version of last year's Senate bill
that extended the permission for a plan to exclude life insurance coverage of deaths in areas of armed conflict <u>and while in training</u> and the same exclusion in the case of disability coverage.

Finally, we continue to believe that the 18 month cap on the provision of benefits should be reduced in the case of nonreservists who voluntarily leave employment to pursue service in the uniformed service if the employee has been with the employer for less than 18 months. We urge you to include the reduction provision which was included in the October 1, 1992 version of last year's bill. Without this rule we continue to believe that employers are subject to unnecessary abuse by individuals who would go to work for an employer for very brief periods only for the purpose of getting additional benefits while serving in the uniformed services. We also believe that the bill needs to be clarified to reflect that the extension of benefits for the full 18 month period is only required to the extent that benefits are provided to other persons on comprable leaves for a period of 18 months. If the benefits are provided to those persons for less time they need only be provided to individuals on uniformed services leave for the same period of time.

H.R. 995

I. Health and Welfare Benefits Issues

There are several issues which are addressed by the Senate bill which are not addressed by the House bill. We believe that the solutions to these issues which are either included in the

current Senate bill or included in the October 1, 1992 version of last year's bill (or alternatively in our comments) are vital in order for employers to be able to comply with the provisions of this bill.

Specifically, the House bill also would require employers to treat employees who leave employment to serve in the uniformed services as if they were on leave of absence and entitled to the to the most favorable benefits provided to any other employee on leave of absence from the employer. We have already discussed some concerns that we continue to have regarding the language of the comparable provision in the Senate bill. Again, we urge you to make those changes we have noted. However, the House bill fails to address even more issues.

Specifically, the House bill does not include appropriate coordination of benefits provisions with respect to coverage available to the individual serving in the uniformed services. The effect of this is to potentially allow the collection of duplicate benefits and to significantly increase health related costs for employers. In addition, the bill does not clearly address the effect of war exclusion clauses frequently included in life and disability insurance policies. Again, this could have a significant impact on employers health related costs at a time when it is difficult for many of them to retain even minimal benefits.

The bill requires the employer to provide benefits on an ongoing basis for up to five years for servicepersons with as little as one hour of service with the employer. These benefits must be funded entirely by the employer to the extent they are employer funded for any other employee on any kind of leave. This kind of time period is patently unreasonable. We urge the Committee to retain the cap on the time period for providing the benefits included in the Senate bill along with the reduction in that cap included in the October 1, 1992 version of last year's bill.

II. Pension Benefits Issues

The House bill would require employers to pay up to five years of retroactive pension accruals or missed contributions plus earnings under defined benefit and defined contribution plans for periods during which employees leave employment and serve in the uniformed services. Under current law, employers provide retroactive accruals under defined benefit plans and provide service credit under all plans. These accruals and service credits are provided so that an individual's military service does not reduce benefits based on length of service with an employer. In addition, many employers would like to permit employees to make up missed contributions to plans subject to Section 401(k) of the Internal Revenue Code and to make up missed matching contributions.

However, requiring employers to make up missed discretionary contributions under profit sharing plans or to reallocate already allocated contributions plus earnings poses enormous problems for employers. Contributions to most profit sharing plans are based on current compensation without regard to length of service with the employer. During extended leaves

of absence, where there is no current compensation, it is highly inappropriate to force employers to make contributions to profit sharing plans. In addition, in the case of small employers, the costs of restoring up to five years of contributions may prove prohibitive thereby discouraging them from even maintaining a qualified plan.

Requiring employers to reallocate what has already been allocated is simply not administratively feasible. Generally, records of past allocations are not kept readily available for five years back. In addition, employees would come and go during such a lengthy period and it would be impossible to track their location much less recover incorrectly allocated amounts.

Requiring employers to restore earnings on missed contributions is completely inappropriate. It is unacceptable to expect employers to contribute amounts that would have been earned if contributions had been made. The simple fact of the matter is that the monies were not in the plan's trust, therefore they could not have been earning anything based on the plan's investments. Such a policy would be a serious deterrent to any employer considering whether to establish or continue to maintain a defined contribution plan. Such a contribution by employers is clearly not a benefit provided to other employees on leave of absence and it would be inappropriate to require employers to do so in the case of those persons on uniformed services leave.

In addition, the value of the contribution could have gone down during the leave depending on which investment the contribution is treated as having been invested in. This puts employers in the awkward position of providing potentially less benefit to some individuals returning from military leave or allowing the individual the benefit of selecting (where participants select their investments, a common and growing practice) the investments upon their return and having the advantage of hindsight. We applaud the inclusion of Section 4317(b)(4) in the Senate bill which provides that earnings will not be required to be restored, no reallocations will be required and that no elective employer contributions will be required to be made up for the period of the uniformed services leave.

In a significant departure from current law, Section 4316 of the House bill requires employers to make contributions to their defined contribution plans on behalf of returning veterans, but does not make corresponding changes to the Internal Revenue Code. Without these correlating changes employers will be forced to choose between complying with the requirements under this bill or disqualifying their plans. In addition, without correlating amendments, it will remain unclear how to treat make-up contributions for tax purposes. For example, would they be treated as made in the year they would have been made except for the military service or attributable to the year when made up? Would amended returns be required? In addition, how should the contributions be handled for coveragerequirements, nondiscrimination testing, annual addition limitations and deduction purposes? How should the issues of excess contributions and deferrals be resolved?

As we have indicated in our discussions with the Veterans' Affairs Committee staff, it is imperative that correlating amendments be made to the Internal Revenue Code to ensure that all applicable rules are being appropriately complied with, but we are delighted that the Senate proposed bill includes a provision which would preclude any employer from suffering adverse tax consequences under the Internal Revenue Code as a result of its compliance with the Senate bill. Also, we are pleased that the Senate bill includes a provision addressing the definition of "compensation" for purposes of accruing benefits, although we should note that the definition should apply in the case of a defined contribution or defined benefit plan during the leave period.

Without the inclusion of the Senate bill provisions addressing make-up contributions, reallocations of contributions and forfeitures, restoration of earnings, deemed compensation and disqualification and other tax consequences under the Internal Revenue Code, we must vehemently oppose the bill. In addition, there are several technical issues which should be addressed in the bill including application to church plans, certain contributions by multiemployer plans, counting hours for the person on service related leave and use of the "deemed compensation rule" for both defined benefit plans and defined contribution plans.

Conclusion

In conclusion, we would like to take the opportunity to praise the efforts of the Senate Veterans' Committee staff in their efforts last year to meet with us to discuss areas of concern. We believe that together we achieved important modifications to the Senate bill which made it workable and supportable by the employer community. Many of those changes are included in this year's bill. We urge you to include the additional changes which were dropped from this year's bill and to include the technical changes noted in the attachment. Again, we are very pleased that the pension modifications are included in the Senate bill. Under no circumstances could we possibly comply with the bill without those modifications and we urge the Committee to <u>not</u> adopt the House version of the bill.

Technical Issues on Proposed Senate Amendments to Veterans Reemployment Rights Act

This summarizes technical issues in the Senate bill in addition to the inclusion of various provisions from the October 1, 1992 version of last year's bill (s. 1095) which were dropped from this year's bill.

1. §4302(a), p. 3: says this bill doesn't supersede any Federal or State law that provides rights or benefits "more beneficial to a person" than under this Act. We assume that doesn't undercut the effect of the provision under Section 4316(b)(2).

2. §4303(4)(A)(i), p. 5: this should be interpreted as applying to insurance companies that administer employers' life, long term disability (LTD) or health plans, so that they cannot refuse to comply their policies to meet employers' compliance requirements.

3. §4303(12), p. 7 - note, increasingly, retiree health coverage is becoming a perquisite of seniority, as employers move to modes under which the level of employer-paid coverage is linked to years of service. This could result in significant confusion and litigation depending on how retiree health is handled in health reform.

4. §4311(a), p. 10 - We think this provision addresses the problem of plans that cut off life insurance or other coverage immediately on entry into military duty, but has a run-out (end of month, 30 days, etc.) for any other type of termination. Clarification would be useful here.

5. §4311(d)(1), p. 12 - should add the proviso that this exception would not apply to foreign laws that would require an employer to violate U.S. laws prohibiting discrimination on the basis of race, sex, religion, national origin or disability. (I believe the Supreme Court has held that Title VII is binding on employers doing business overseas, so that they cannot, e.g., comply with a "No-Jews-Allowed" law in Saudi Arabia.

6. §4312(e)(3), pp. 18-19 - A late-returning employee's right to be treated consistently with the employer's established rules, policy and practice is appropriate, except that for this purpose the rules, policy and practice established pursuant to collective bargaining for employees in a collective bargaining unit shall apply only to employees who were in that unit when they went on leave. Section 4312(f) - raises the concern that employers may be forced to adopt policies which would discharge employees for failure to report regardless of the reasons for absence in order to curb abuse.

7. §4313(b)(1), p. 24 - The last person to leave would ordinarily be the most qualified for the position, assuming there have been changes in the duties of the position or the tools and equipment used (e.g., computers, phone systems), with which the more recent incumbent is more likely to be familiar. Section 4313(2) - could be interpreted to mean that an employee absent due to service in the uniformed services should be treated as receiving any promotions to which he or she may have become entitled to throughout the leave period if the person had remained employed by the employer.

8. §4316(a), p. 30 - §4303(2) defines "rights and benefits" to include bonuses, severance

pay and vacations. This subsection requires that a reemployed veteran get the rights and benefits "that such person would have attained if the person had remained continuously employed." We presume this means that the reemployed veteran is entitled to the level of benefits, bonuses, severance, vacation, etc. with respect to future service that he or she would be entitled to, at that point, based on the accumulation of covered service during the leave period, but not that the person is entitled to make-up bonuses, vacation time, etc. that he or she would have received during the period of military service if actual service for the employer had not been broken.

9. §4316(b)(1), p. 30 - Exceptions from this comparability rule for employees on other types of leave of absence are needed for leaves that are mandated by federal, state or local law, such as jury duty and family or medical leave, or by a collective bargaining agreement [because CBAs are not manipulable by the employer, and requiring the employer to top up everyone else to the level negotiated by the union will put severe pressure on the collective bargaining process since it gives the employer an incentive to resist union demands for paid leave, personal days, etc. for reasons unrelated to the bargaining unit employees or the cost of the benefit for them]; for benefits associated with short-term leaves, such as bereavement leave, sick leave, personal days, etc., where the employee may be kept on the rolls because it's simpler and cheaper than taking them off and then putting them back on.

If the employer grants some types of paid leave, would continued pay be required to be extended to people on military service? Note, bonuses are one element of current compensation, typically based on the employee's achievement of identified objectives, so they are typically classified as "compensation" rather than a "benefit". Employers will not support a bill which requires continued compensation for individuals on uniformed services leave, although many do provide compensation for employees participating in the reserves because their absence is of short duration.

In addition, we assume this would not require comparability with every special arrangement worked out with individual employees on an ad-hoc basis as they go on leave, such as making in-home computers and other telecommuting equipment available to a skilled employee on maternity leave, continuing pay or benefits for an individual who agrees – under employer pressure – to go for alcoholism or substance-abuse treatment, or other arrangements tailored to particular employee's special needs and the employer's special need to retain or rehabilitate that employee, since the comparability rule only applies to leaves or furloughs established pursuant to a "practice, policy, agreement or plan".

What is a "funded benefit plan"? Presumably it's not only pre-funded plans, but any plan for which the employer pays out cash? But the employer ultimately pays for all benefits of any value, even if it doesn't pay for them while they are accruing. If there are any benefits for which employees on leave must contribute that are subject to this leave-comparability rule, employees on military leave should be subject to that same condition, without distinction between "funded" and "unfunded" plans.

It should be made clear, in legislative history if not in the statute, that for purposes of

the whole subsection, special rules addressing particular types of benefits apply only within the context of comparability, so that benefits are only required to the extent that it they are offered to people on the types of leaves that are used for comparability. For example, individuals on leave for service in the uniformed services should not receive benefits for a full 18 months if the employees on comparable leaves are receiving benefits for a shorter period of time. The serviceperson's benefit period should be capped at the same time period. In addition, we continue to advocate a reduction of the 18 month cap in the case of nonreservists who voluntarily leave employment to serve in the uniformed services if their service with the employer is less than 18 months. This reduction was included in the October 1, 1992 version last year's bill.

There are some words missing between lines 19 and 20.

10. §4316(b)(3), p. 31 - permission for a plan to exclude life insurance coverage of deaths in areas of armed conflict should be extended to deaths in the course of training or while in an area of armed conflict, and same rule should be applied to disability coverage (long-term or short-term, under an LTD plan or a pension plan).

11. §4316(c), pp. 31-33 - the right way to coordinate this with COBRA would be to provide that this period of extended coverage can be charged against the period of COBRA entitlement, if the plan administrator gives timely notice that a COBRA qualifying event has occurred. Given the jurisdictional concerns created by a COBRA amendment, the best alternative is to provide that this does not apply to the extent the employer treats the reduction in hours as a COBRA event and gives people their COBRA rights. Family members have greater rights under COBRA because they have independent election rights, and everyone has greater flexibility in that they can take core-only coverage under COBRA.

12. §4317(a)(1)(A) - p. 34 - by limiting the pension-restoration rules to ERISA plans and public plans, they are exempting non-public plans that are exempt from ERISA. The most important category is church plans.

13. §4317(a)(2)(B) - p. 35 - legislative history should clarify that each week on military duty equals 40 hours of service (or 5 days or one week) for this purpose, so plans do not have to reconstruct actual working hours within the military.

14. §4317(b)(1) - p. 36 - multiemployer health and welfare plans will need a similar rule requiring employers to contribute to pay for any extended health, life or other benefits during the period of leave under the comparability rule.

15. §4317(b)(3) - p. 37 - the "deemed compensation" rule should apply also for purposes of determining the benefit accruals under a defined benefit or defined contribution plan during the leave period.

16. §4322(c) - p. 43 - The bill provides for enforcement procedures which are inconsistent with ERISA. The inclusion of the possible award of damages could entitle employees on military leave to recovery not available to other employees on leave. We recognize that there are other laws which have failed to address the potential for conflicts with ERISA. We believe that the potential conflict with ERISA will add to confusion and ultimately litigation. We also are concerned that the possible award of damages will subject employers to unnecessary and costly litigation in abusive cases.

PREPARED STATEMENT OF D.J. GRIBBIN, LEGISLATIVE REPRESENTATIVE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

STATEMENT OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Subject: The Uniformed Services Employment and Reemployment Rights Act of 1993

Before: Senate Veterans' Affairs Committee

Date: May 13, 1993

Mr. Chairman, on behalf of the National Federation of Independent Business (NFIB), I want to thank you for allowing us to participate in this hearing. NFIB is the nation's largest small business advocacy organization, representing over 600,000 small business owners nationwide. Our membership includes business owners from every industry and from every part of the country.

Let me begin by saying that NFIB agrees with the underlying principle of S.843, the Uniformed Services Employment and Reemployment Rights Act of 1993. Those who are called up to serve our country should not be threatened with the loss of their job when they return to private employment. At the same time, NFIB believes that the cost of maintaining a national defense should be borne by our nation as a whole and no one element of our population should be required to carry a disproportional share.

NFIB entered the debate on this legislation last year. We were very concerned that the enactment of S. 1095 would have required small employers to pay costs that should be paid by

83-460 O - 94 - 3

the federal government. I want to commend the staff of this committee for making modifications to last year's bill that will help avoid some of the unintended costs that bill could have placed on small employers. Although this year's legislation is a noticeable improvement over last year, NFIB still has some concerns about the impact this legislation will have on small business owners.

CONCERNS WITH S. 843

Allow me to address NFIB's concerns with this legislation in the order they appear in S.843.

Benefits While on Leave

Subsection 4316(b) establishes that those performing service in the military will be deemed to be on a leave of absence from their job. It also grants those employees the same rights and benefits granted to other employees on leave as established by the business's practice, policy, agreement or plan.

Thus, small employers must treat any employee who leaves their employ to join the uniformed services as if that employee were on a leave of absence, and the employee has the right to any benefits usually conferred upon employees taking leave.

Small businesses rarely have employee manuals or any other written document detailing what benefits employees are entitled to. NFIB is concerned that an employer who grants a sick employee 6 weeks of paid leave may establish a "practice" under section 4316 and be required to give 6 weeks of paid leave to any employee who later enlists in the uniformed services. In addition, does an employer who provides a manager (who has been responsible for doubling the company's sales) a week of paid leave establish a "practice" under this section that would apply to non-management positions?

To remedy these concerns, NFIB suggests that this section not apply to leave given in situations of illness or pregnancy and that no employee be eligible for paid leave if they would have been ineligible for such leave if they had continued working for the business.

Health Insurance Coverage

Subsection 4316(c) allows those leaving private employment for the uniformed services to elect continued coverage by their employer's health insurance policy for up to 18 months. This right is similar to the right created by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). NFIB's concerns about this provision are two-fold. First, COBRA does not apply to businesses with fewer than 20 employees, but this COBRA-like provision does. COBRA was created to protect those who may go without health insurance because they are between jobs. Extending this policy to a situation in which an employee is leaving to go into

the service (where he or she will be fully insured) does not follow the rationale of COBRA

Some have suggested that the continued employer coverage is important to those entering the military, enabling their families to enjoy the better health care coverage of the former employer. This concern is due to inadequate CHAMPUS (Civilian Health and Medical Program of the Uniformed Services) coverage and should be remedied by increasing the quality of CHAMPUS, not by creating new COBRA-like benefits for those entering the service that must be paid for by small businesses who are already struggling under disproportionately high health care costs.

Second, this subsection requires those electing COBRA to pay only 102% of premium cost, even though a study by the National Association of Manufacturers found that the cost of providing COBRA is 253% of premium cost. NFIB would recommend that this section be amended to require the person electing COBRA to pay the full cost of that election.

As a matter of public policy, if a person deciding to enter the uniformed services wants to continue their health care coverage under the former employer, although fully covered by the military, then that person should pay the full cost of the extra coverage.

Subsection 4316(c) also contains language prohibiting employers from imposing waiting periods before they will provide health insurance for returning veterans NFIB agrees that waiting periods should not be imposed, but small employers have no control over these waiting

periods -- insurance companies set them. NFIB recommends that the report language make it clear that employers who purchase health insurance from an insurance company are not liable if the insurance company tries to impose a waiting period on a returning veteran.

Pension Contributions

With some restrictions, section 4317 requires employers to continue to contribute to the pension plan of employees who have left to serve in the uniformed services. The Committee deserves praise for not applying these rules to profit-sharing pension plans. Small business owners create a profit-sharing plan as an incentive for their employees. The better the employees perform, the more the business earns. The result is more money flowing into the retirement plans of the employees. Contributions to the plan are not set and fluctuate according to the profitability of the business.

Including these plans in this section would be incompatible with the purposes or realities of profit-sharing plans. It would allow an employee to quit work, enlist in the military, serve for five years, return to work for one day, and collect five years worth of profit-sharing contributions earned by the employee's co-workers. Providing a veteran with this type of windfall is outside the scope of the general purpose of this legislation.

Treating Reservists and Enlistees the Same

Much of the concern small business owners have in regard to this legislation is how it applies to two classes of employees: those who are suddenly called up to serve and employees who purposely quit their jobs and enlist in the military

Employers have mush more sympathy and concern for the first group of employees than the second. Most small business owners would not hesitate to assist an employee who has been called up suddenly. They would probably automatically approve a request to take paid leave, extend health insurance coverage, or maintain the employee's status in the company's pension plan wherever possible. And of course, the employee's job would be waiting upon their return.

However, the coverage of employees who voluntarily enlist raises a different response. For all intents and purposes, these employees have quit their jobs. Yet S.843 does not require the departing employees to even inform the employer of any intention to return

The equal treatment of reservists and enlistees raises a number of questions with small business owners. Why should an employee be able to quit work, start another job, four years later have a change of heart and be allowed to demand his old job back with all the benefits that would have accrued? In addition, is it fair to the worker who replaced the departing employee to be summarily tossed out of a job because the original employee decides the military was not such a great career move?

It is at this point that the goals of S.843 and the thinking of small business owners part ways. While NFIB understands that current law does not distinguish between these two groups of employees, it should. Small business owners should not be required to hire a temporary replacement every time an employee joins the uniformed services.

CONCLUSION

In conclusion, NFIB strongly supports the goals of S.843, protecting the job security of the men and women who are willing to protect our nation's freedom and rewarding those sacrifices. However, NFIB also believes in setting appropriate limits on those rewards. Some provisions of S.843, especially as they relate to employees who enlist in the uniformed services, cross that line. Our nation should justly reward those who serve it, but a just reward is a reasonable one.

PREPARED STATEMENT OF MICHAEL BRINCK, NATIONAL LEGISLATIVE DIRECTOR, AMVETS

Mr. Chairman, thank you taking our views on veterans reemployment rights (VRR) legislation. Let me begin by saying that while H.R. 995 improves a veterans reemployment prospects, S. 843 appears more favorable to the veteran and strikes a balance that will provide reasonable reemployment rights while not placing undue burden on employers.

DoL statistics show referrals to the Department of Justice in FY 1992 nearly doubling over FY 1991, with a slightly smaller new caseload. In FY 1991, DoL opened 2539 new cases with an average time of closure or referral of 48 days. In 1992, DoL opened 2332 new cases with an average closure/referral time of 56 days. Initial statistics show a drop in new cases and referrals for 1993.

At a time when U.S. corporations are shifting facilities overseas and multi-national operations are common, it is important to extend VRR to those veterans employed in overseas positions.

With many employers converting full time jobs into temporary positions, it is important to cover veterans filling temporary positions to the extent that they still exist at the time of application for VRR. H.R. 995 excludes temporary positions and AMVETS feels this may provide yet another incentive for employers to convert jobs to avoid VRR.

We are all familiar with the problems of getting paperwork from the government. Therefore, AMVETS does not concur with the provisions of section 4312(f)(3)(B). Pension adjustments can be made in cases of fraudulent VRR application.

AMVETS supports the stronger provisions in S. 843 that would require OPM to ensure that a civil servant veteran is offered a similar position in a federal executive agency. Likewise we prefer the Senate bill's more aggressive position on behalf of judicial, legislative branch employees and National Guard technicians that will require OPM to ensure executive branch

employment and to waive competitive status.

Federal security agencies face special problems with reemployment. The nature of intelligence work demands the highest standards of reliability and we accept the special treatment afforded to the security agencies.

AMVETS agrees with the S. 843 provisions guaranteeing rights or benefits in the manner of those employees on furlough or extended leave of absence. We feel the 18 month limitation with the ability to resume uninterrupted coverage upon application for reemployment is a reasonable approach, as well as the imposition of a maximum 102% premium on health plans.

We are all aware of the long adjudication times to establish entitlement to VA treatment for service-connected injuries or illness. Therefore, since VA may not have established service-connection, it must remain the employer's responsibility to cover treatment costs to the limit of the policy. AMVETS suggests VA be required to reimburse the health plan and the employee for any payments and/or copayments made during the adjudication period if service-connection is established.

A designated period of protection from discharge upon reemployment allows a cooling off period in which an employer who is unhappy with the extra burden of employing those willing to serve the nation can appreciate the sacrifices made by those employees. Therefore, we support the House provisions that would extend protection to those serving less than 31 days.

AMVETS agrees with the Senate bill that use of civilian leave should be limited to that accrued at the commencement of service.

Pension plans form the major retirement planning vehicle for many employees. Therefore, it is important that those called to duty be treated in the same manner had they remained on the job. Therefore, AMVETS prefers the treatment of employer contribution contained in H.R. 995 section 4316(b)(1)(B) over the Senate's more restrictive 4317 (b)(4). However we prefer the more precise definition of the retroactive payment period contained in s. 843 section 4317 (b)(2). We also support the Senate bill's section 4317 (b)(3)(A) that incorporates the escalator principle.

For purposes of discussion, AMVETS would like to propose that responsibility for administration and enforcement of VRR be moved from the Department of Labor to the DoD's Office of Guard and Reserve Affairs. We are concerned that fiscal problems are forcing DoL to cover more and more responsibilities with fewer and fewer resources. For instance, it appears that LVER and DVOP billets are being short-funded. ASVET resources in general are being reduced. So make it the responsibility of the department that called the veteran to active duty responsible to ensure the veteran's reemployment rights are not violated and for the veteran's reentry into the civilian workforce. Each of the services has a transition program, and VRR seems a logical part of that program. It would also be in keeping with the bill's stated purpose "that the federal government should be a model employer". Many private sector businesses are offering significant outplacement services including counseling and retraining as part of reductions in force. Why shouldn't DoD do the same.

We prefer S. 843 enforcement provisions designating federal district court as having jurisdiction use of the Special Counsel, the use of subpoenas in VRR cases by DoL, and inclusion of the federal government as subject to subpoena. AMVETS is also uncomfortable

with H.R. 995's provisions that would provide government employees additional rights in regulation over private sector and state employees.

Mr. Chairman, to summarize, while the differences between the two bill are often minor, AMVETS feels that the Senate bill strikes a better balance. As always, AMVETS thanks the members of this committee for its fin work on behalf of veterans and we urge the adoption of this important legislation.

PREPARED STATEMENT OF LENNOX E. GILMER, ASSOCIATE NATIONAL EMPLOYMENT DIRECTOR, DISABLED AMERICAN VETERANS

STATEMENT OF
LENNOX E. GILMER
ASSOCIATE NATIONAL EMPLOYMENT DIRECTOR
DISABLED AMERICAN VETERANS
BEFORE THE
SENATE VETERANS AFFAIRS COMMITTEE
MAY 13, 1993

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the more than 1.4 million members of the Disabled American Veterans (DAV) and its Women's Auxiliary, I want to take this opportunity to thank you for your ongoing concern and interest in providing meaningful employment opportunities and protections to our nation's veterans.

We are very appreciative of your introduction of S. 843 as it relates to improving reemployment rights and benefits for veterans, reservists and members of the National Guard.

Mr. Chairman, overall we support the intent of S. 843 and wish to offer the following comments:

Mr. Chairman, Section 4301 of S. 843 states "It is the sense of Congress that the Federal Government should be a model employer in carrying out the reemployment practices provided for in this chapter." We fully support that statement and urge its retention in the final bill.

Section 4303(3)(A) defines the term "employee" and Subsection (3)(B) includes an individual who is a citizen of the United States employed in a foreign country. We support that provision. We believe Section 4303(4)(A) which defines the term "employer" should be amended to specify that American owned companies doing business in foreign countries are covered by the Act.

Under that same section you include as an "employer" any "successor in interest to a person, institution, organization, or other entity referred to in this subparagraph." We support the inclusion of this reference.

In defining who is included as an employer under "Federal Government", the bill includes any "Executive agency (as that term is defined in Section 105 of Title 5)." We support the inclusion of all federal government agencies, corporations and others identified in Section 105.

We agree with the provisions contained in Section 4311 which provide protection for "Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited."

Mr. Chairman, the change to current law proposed in Section 4312(a)(2) that amends the cumulative length of service from

four years to five years is commendable. We also support the provision extending that five year period if the extension of military service is for "military necessity." We also support the provision that extends the five year period by excluding such periods of service as now defined and delineated in section 4312(c)(1),(2),(3), and (4).

Section 4312(e)(1) requires a former service member to "notify the employer ... of the person's intent to return to a position of employment ..." (Emphasis added.) We believe this provision is very important, especially as it relates to disabled service members.

The new Section 4312(e)(2)(A) and (B) extends the time within which a service member would have to report to the employer on the basis of being "hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated by, the performance of service in the uniformed services...." We support the extension of the 2 year period if circumstances are beyond the individual's control "which make reporting within the period specified in subparagraph (A) impossible or unreasonable." (Emphasis added.) This satisfies our concerns expressed several years ago about a severely disabled service member needing a long period of convalescence. Mr. Chairman, we appreciate your support on this important matter.

Mr. Chairman, Section 4312(g) provides "The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5 United States Code, relating to veterans and other preference eligibles." (Emphasis added.)

We believe this provision is ambiguous and needs clarification. Our concern revolves around the phrase "superior claim." For example, if while a person is called to active duty in the reserves, a disabled veteran or other preference eligible is temporarily assigned to fill that position, does that preference eligible have a "superior claim?"

Mr. Chairman, Section 4313(b)(1) discusses the situation where "two or more persons are entitled to reemployment ... in the same position ... and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position." This is similar to the issue of "superior claim" -- e.g. veteran A leaves his job to report to active duty and is eligible for reemployment rights -- veteran B leaves her job to fill the position vacated by veteran A. Veteran B then enters military service and under other circumstances would have a right to her job upon completion of military service, all other criteria being met. As I understand the proposed legislation veteran B

would then not have any reemployment rights. We believe something needs to be added to provide protection to veteran B.

Mr. Chairman, Section 4317 discusses in great length "Employee pension benefit plans." We are not experts in employee pension plans and the benefits that flow from those plans. However, we are concerned that Section 4317 may not provide protections in pension benefit plans that should be available under the long standing precepts of veterans' reemployment rights laws and judicial interpretations. It appears Section 4317 provides more protection to employers than to veterans.

Since the inception of reemployment rights statutes the basic premise has been to make the veteran "whole", i.e. restore him or her to a status that he or she would have enjoyed had they not left employment for military service. We believe this should include all rights and benefits accruing to employees to the same extent they would accrue to military persons had they not left civilian employment. We believe Section 4317 diminishes that concept.

Mr. Chairman, Section 4322(c)(1)(A)(ii) provides a "State or private employer, ... to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter...." Section 4322 (c)(1)(B) provides the "compensation ... shall be in addition to, and shall not diminish, any of the other rights and benefits provided for in this chapter." Mr. Chairman, we support these provisions and urge their retention, but urge an amendment to include federal government employers.

Section 4322 also provides the awarding of "reasonable attorney fees, expert witness fees, and other litigation expenses," for those who retain private counsel and prevail in their action on pursuing their reemployment rights. We support this provision.

Mr. Chairman, we want to thank you for your support and concern in providing protection to federal employees who are eligible for reemployment rights. The DAV has long believed that federal employees enjoyed less protections then private sector and local and state government employees. This difference in benefits was in the enforcement provisions.

Private, state and local government employees have rights of representation through the Department of Labor and ultimately the Department of Justice if court action is pursued. On the other hand, federal employees are required to pursue their own complaint with their own counsel, or without counsel. Section 4323 corrects that and we support the provisions of the bill providing for representation by the Office of Special Counsel.

Section 4323 also provides an alternative and allows the aggrieved veteran to retain his or her own counsel and, upon successful prosecution of the claim, the veteran may be reimbursed certain legal fees. This provides equal benefits for equal service. The DAV supports this proposed representation process for federal employees who find a need to pursue their reemployment rights through legal remedies.

Mr. Chairman, Section 4332(c) requires a report to be submitted "Not later than one year after the date of the enactment of this act..." This language requires the Secretary of Labor, Attorney General of the United States, and the Special Counsel to submit separate reports on their activities. We recommend that one report be filed on behalf of all reemployments rights activities by the Secretary of Labor through the annual report already required by Section 4107, Title 38 USC. If the Attorney General and the Office of Special Counsel report their activities under Chapter 43 directly to the Office of the Assistant Secretary for Veterans Employment and Training a single report could be filed on an annual basis.

Mr. Chairman, S. 843 is silent with regard to protections for temporary employees. In previous testimony, we raised a concern over the exemption from reemployment rights protections for those who hold temporary positions. Our concern, Mr. Chairman, is limited to experiences with federal departments and agencies rather than private sector employers. Federal agencies will use "temporary positions" to avoid exceeding personnel ceilings and to otherwise avoid complying with other provisions of the federal personnel system. It is thus possible that employers could use a series of temporary positions to circumvent the intent of this legislation.

In a letter to Congressman Timothy J. Penny, then the Chairman of the Subcommittee on Education, Training and Employment of U.S. House of Representatives, we expressed our concern as follows:

> In our prepared testimony of March 7, [1991], we expressed concern over the meaning of "temporary position." This concern seems to be satisfied by the Administration's proposal to codify the definition used by the United States Court of Appeals for the Sixth Circuit (Stevens v. Tennessee Valley Authority), 687F. 2nd 158, 161-62 (Sixth Circuit 1982). While we have not reviewed that court decision, it appears the example I cited in my testimony, i.e., Tennessee Valley Authority and its use of temporary appointments, may be addressed in the circuit court finding.

Mr. Chairman, we believe under certain limited situations, "temporary employees" should be covered.

Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions.

PREPARED STATEMENT OF JAMES B. HUBBARD, DIRECTOR, NATIONAL ECONOMIC COMMISSION, THE AMERICAN LEGION

STATEMENT OF
JAMES B HUBBARD, DIRECTOR OF ECONOMICS
THE AMERICAN LEGION

before the

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES SENATE

May 13, 1993

Mr. Chairman and distinguished members of the Committee The American Legion is pleased to have an opportunity to express its views on the House and Senate versions of the Uniformed Services Employment and Reemployment Act of 1993

Both H. R. 995 and S 843 seek to modify Chapter 43 of Title 38, United States Code, by clarifying the existing veterans' reemployment rights (VRR) law and by making numerous other statutory improvements to that chapter The American Legion supports the intent of both bills.

Before commenting on the provisions of those bills, we would like to take a moment to commend this Committee, and the House Veterans' Affairs Committee, for your efforts to make the provisions of Chapter 43 easier for employers and veterans to understand As you stated, Mr. Chairman, when you introduced S 843, "Unfortunately, over the last 53 years the VRR law has become a confusing and cumbersome patchwork of statutory amendments and judicial constructions that, at times, hinder the resolution of claims " We couldn't agree more

The American Legion also appreciates the attempts of both Committees to eliminate, or at least minimize, the employment problems that are often incurred when veterans attempt to return to their former civilian jobs In an age when America is encouraging noncareer service in the uniformed services, it is imperative that we ensure that our citizen soldiers are not penalized for their service to their country

Having said that, Mr Chairman, we would now like to turn our attention to the provisions of H. R. 995 and S 843 For the sake of consistency, our remarks will follow the format of the Summary of Differences, which was produced by this Committee's staff.

1. EXTRA-TERRITORIAL COVERAGE

The Legion favors the Senate bill, which would provide VRR coverage to the employee/veteran if that person is a U. S citizen and the employer is an American controlled company in a foreign country.

2 TEMPORARY POSITIONS

We do not believe that temporary positions should be excluded from VRR coverage. Therefore, we favor the Senate bill

3. DOCUMENTATION

The American Legion believes that the veteran/employee must also bear some responsibility under VRR law. Since each veteran receives a DD-214 on the completion of his/her military service, we do not think that it is unreasonable for the employer to request a copy of that document before reemploying the veteran and restoring his/her benefits. In the case of Guard and Reserve members who are activated, a copy of the orders releasing them from active duty should be provided to the employer.

4. REEMPLOYMENT POSITIONS

We favor the House bill,which would require that a veteran who is absent for less than 91 days be allowed to return to his/her former position. For those who are absent for a longer period of time, the employer would be required to provide a "like position"

5 REEMPLOYMENT BY THE FEDERAL GOVERNMENT

a FEDERAL EXECUTIVE AGENCY EMPLOYEES

The American Legion definitely favors the Senate bill, which would "require" OPM to place the veteran in an alternate position of like seniority, status and pay in another Federal executive agency We strongly believe that the Federal government must take the lead in ensuring that those who answer the country's call are not penalized

b JUDICIAL BRANCH AND LEGISLATIVE BRANCH EMPLOYEES, AND NATIONAL GUARD TECHNICIANS

Once again, we prefer the Senate bill because it would require OPM to ensure that a veteran receives an offer of reemployment in an alternative position in a Federal executive agency.

c. FEDERAL SECURITY AGENCIES

The American Legion favors the Senate bill which would provide protection for veterans who are employees of Federal security agencies

6 RIGHTS AND BENEFITS UNDER PRACTICE OR AGREEMENT RELATED TO OTHERS ON FURLOUGH OR LEAVE OF ABSENCE

The provisions of the Senate bill are reasonable and do not place an unfair burden on the employer

7. RIGHTS AND BENEFITS PROVIDED BY STATUTE WHEN THERE IS NO PRACTICE OR AGREEMENT IN EFFECT

a COST TO EMPLOYEE

The American Legion prefers the House bill, which would allow the veteran to pay the cost of any benefits continued during his/her absence This provision is fair to both the veteran and the employer

b PERIOD OF CONTINUED COVERAGE

The Senate bill requires the veteran who elects to continue his employer sponsored health plan during his absence, to pay 102 percent of the full premium for coverage up to 18 months. Since the veteran will be covered by government insurance during his/her active duty, this provision appears to be just and fair.

c. EXCLUSION OR WAITING PERIOD FOR HEALTH BENEFITS

We favor the Senate bill because it would not subject the veteran to an exclusion or waiting period for health plan coverage if his/her original coverage had not been terminated because of military service

8. PERIOD OF PROTECTION FROM DISCHARGE UPON REEMPLOYMENT, EXCEPT FOR CAUSE

We favor the provisions of the House bill because it would provide protection for Reservists who are activated for a period of less than 31 days. Currently, they have no protection in that situation.

9. USE OF CIVILIAN LEAVE

The American Legion prefers the provisions of the Senate bill because it does not exempt temporary employees.

10. MULTI-EMPLOYER PENSION BENEFIT PLANS

We favor the Senate bill because it would afford the veteran with more protection

11 PENSION BENEFIT PLAN CONTRIBUTIONS

a LIMITATION OF CONTRIBUTION AMOUNT

The difference between the bills is that the Senate's would limit the amount of the employer's contribution We would not oppose this provision as long as the employer

is required to contribute the same amount that he would have contributed had the veteran remained continuously employed throughout the period of service

b. ELEMENTS OF EMPLOYER CONTRIBUTIONS

The American Legion favors the House bill, which would provide better protection to the veteran.

c PERIOD FOR MAKING RETROACTIVE CONTRIBUTIONS

We like the additional provision of the Senate bill which requires that the veteran receive a payment period not less than the length of the absence for service

d. COMPUTATION OF LIABILITY AND CONTRIBUTIONS

The Senate bill is preferable because COLAs would be figured in the contributions.

12. PENSION BENEFIT PROTECTIONS

The American Legion favors the provision of the Senate bill because it would provide protection to the employer if the veteran is not reemployed.

13. ENFORCEMENT OF RIGHTS

We prefer the Senate bill because of the additional provision which, if voluntary compliance is not obtained, would require the Secretary of Labor to inform the veteran of the results of the investigation and of his/her rights to pursue the matter further

14. VENUE

The Senate bill is preferable because it would specify the appropriate Federal district court for actions against a State as an employer or against a private employer

15 OFFICE OF SPECIAL COUNSEL

The American Legion prefers the provision of the Senate bill because it would provide greater protection for the veteran

16 MSPB AWARD

Again, we prefer the provisions of the Senate bill because it offers greater protection to the veteran.

17. SUBPOENAS

As stated earlier, The American Legion believes that the Federal Government must take the lead in ensuring that the reemployment rights of veterans are not violated. We further believe that the Secretary of Labor should have the power to subpoena a Federal employer if it is in violation of the law

18 REGULATIONS

We oppose the provision of the House Bill because we do not believe that greater or additional rights for Federal employees are necessary. Both public and private sector employees should be treated equally under VRR.

19. REPORTS

The American Legion believes that Congress must remain in touch with VRR activities and problems. Therefore, we favor the provision of the House bill, which would require an annual report to Congress. This will help to ensure effective implementation of the law.

20. REVISION OF FEDERAL CIVIL SERVICE RETIREMENT BENEFIT PROGRAM FOR RESERVISTS

We prefer the provision of the Senate bill because it would provide protection for Reservists who are also Federal employees.

21 EFFECTIVE DATES

The American Legion favors the provision of the Senate bill, which would make the new VRR law effective on reemployments initiated on or after August 1, 1990

Mr. Chairman, that concludes our statement We look forward to working with this Committee on finalization and implementation of this important legislation

PREPARED STATEMENT OF BOB MANHAN, ASSISTANT DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

STATEMENT OF

BOB MANHAN, ASSISTANT DIRECTOR
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

WITH RESPECT TO

S. 843: UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1993.

WASHINGTON, D.C. MAY 13, 1993

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to appear here today. The Veterans of Foreign Wars of the United States (VFW) has a long and strong record of supporting all legislation to make veterans reemployment rights (VRR) a meaningful and effective entitlement. At the present time VRR benefits are outlined in Chapter 43 of title 38, United States Code (USC).

The VFW strongly supports the overall bipartisan thrust of S. 843 which will completely replace the present Chapter 43 of title 38, USC. This action is long overdue because the basic law that was enacted in 1940 has for the past five decades been repeatedly amended by Congress and has, therefore, been subject to numerous court interpretations over these many years. In the judgment of the VFW, the present VRR laws have become very difficult to understand, too

cumbersome to administrate, and not effective enough for either the present day employer or employee.

A summary of the major provisions of this bill is:

- to continue to protect employees or applicants from discrimination based on their military service obligation.
- to expand the term "employee" to include U. S. citizens employed in a foreign country if an American employer controls the corporation.
- to place a 5-year limit, in most cases, that an individual may be absent from a position and still be eligible for reemployment rights to that position.
- to include persons who held temporary positions for reemployment protection.
- to require absent employees to give the employer advance notice of departure for service.
- to require reemployed individual who was absent for more than 90 days for active duty to provide documentation of active service before individual would be entitled to pension benefits for the given period of military service.
- to ensure reemployment rights are retained regardless of frequency or duration of an employee's military service.
- to require employers to make responsible effort to train, retrain, or upgrade returning employee's skills in order to be reemployed.
- to require that employers make a reasonable effort to accommodate service-connected disabled individuals seeking reemployment.
- to provide protection for employees of the legislative or judicial branches; and, that national guard technicians be either returned to former agencies and positions or be offered a similar position in a Federal executive agency.
- to maintain the escalator principle to ensure a returning employee has not lost any rights or benefits because of absence for military service up to a period of 18 consecutive months.
- to provide coverage of civilian employee's health care while on active duty only to the extent that similar care and treatment cannot be provided by the Federal Government while on active duty.
- to ensure continued civilian employee's life insurance coverage, to include a death while on active duty, unless such specific coverage is otherwise excluded in the plan or policy.

- to provide continuing coverage in the employer-sponsored health coverage plan, if it would otherwise be terminated because of extended period of military service. The individual may elect to retain this health coverage plan for a maximum of 18 months if the individual pays 102 percent of the full premium.

- to provide that employer make full employer contributions to any existing pension plan provided absence is for military service.

- to allow a rehired employee time to fulfill his required payments into the pension plan for his total period of absence.

- to establish two different formulas to determine both the employer's and employee's liability for contribution to a pension benefit plan. Both formulas ensure proper and equitable contributions for reconstructed compensation.

- to require the Secretary of Labor to investigate a veteran's complaint of an employer's failure to comply with all VRR requirements. The Secretary will have the power to subpoena documents and witnesses.

- to authorize extensive legal recourse to employees of a Federal executive agency whose cases were not successfully resolved by the Department of Labor.

- to require the heads of intelligence agencies, which are otherwise exempt from the enforcement procedures of VRR, to notify the employee and Director of Office of Personnel Management (OPM) when reemployment is not possible OPM would then be required to place the veteran in a comparable position within a Federal executive agency.

- to allow the award of attorneys fees and expenses of veterans who choose to be represented by private counsel and who win/prevail in court.

- to require the amount withheld for Federal civil service retirement payments for a period of military service to be the same amount that would have been withheld if the employee had not performed the period of service. This action will be retroactive to August 1, 1990.

The following five comments are offered with the intent to improve particular portions of the bill. The VFW cites those instances where we favor H.R. 995 over S. 843:

EXTRA-TERRITORIAL COVERAGE; **recommend adding to S. 843:**

- In a situation where compelling reasons exist for not reemploying an individual in a U.S. based company operating overseas, the VFW believes it is reasonable that a similar

position of like pay and responsibility be offered within the firm's affiliated organization, whenever possible.

TEMPORARY POSITIONS; **favor H.R. 995 because:**

- Eliminating temporary positions altogether from VRR coverage will eliminate an undue burden on small companies or start-up enterprises. An alternative is to specifically state the minimum size of the companies by total number of employees that must provide VRR for temporary personnel.

JUDICIAL BRANCH AND LEGISLATIVE BRANCH EMPLOYEES, AND NATIONAL GUARD TECHNICIANS; **recommend the following substitutions rather than either H.R. 995 or S. 843:**

- The VFW favors using the same law that would apply to the private business sector to the judicial and legislative branches of the government. The present bill passes on responsibility for reemployment for those activities to OPM. We believe it would be easier and cleaner for each federal agency to employ the veteran within their own very large organizational structure.

- Responsibility for satisfying the reemployment rights of national guard technicians should be a Department of Defense (DOD) responsibility when such positions have been eliminated because of reorganization or a reduction-in-force (RIF). In sum, the VFW suggests using OPM to satisfy VRR only as a last resort.

RIGHTS AND BENEFITS PROVIDED BY STATUTE WHEN THERE IS NO PRACTICE OR AGREEMENT IN EFFECT; **favor H.R. 995 as written with the additional provision that:**

- "...the returning veteran is entitled to receive a one time grant from respective branch of service of an amount to cover up to 80% of the cost of all continued benefits."

  Our rationale is that this grant money should come from the line item that funds their unemployment compensation program. We believe this sum would be far less than what

would be required if the veteran were unemployed. Furthermore, the VFW's recommendation has the added advantage of more equitably balancing the concept of making the employee "whole" without causing him as much of a financial burden as the proposed requirement to pay 102 percent of the full premium of health-plan coverage.

PERIOD OF PROTECTION FROM DISCHARGE UPON REEMPLOYMENT, EXCEPT FOR CAUSE; favor H.R. 995 because:

- VFW prefers to have a one year period of protection for VRR for any period of service. In our judgment, it is easier to administer and allow reasonable time to address any unusual personal/family problem(s) that may have been encountered while on active duty and will require a delay before returning to work.

In summary, the VFW believes S. 843 is a very comprehensive and well balanced bill. On the one hand it recognizes the changing and more active role we expect reservists and national guard servicepersons to play in future uses of military force. On the other hand, it covers all the many new features of employment benefits that goes far beyond the weekly pay check of the 1940s and 1950s.

Of equal importance is the fact that this bill makes certain that service members, i.e., the employee and the employer both understand what is expected when the service member is called to active duty. And, like the original law, this bill includes the full range of civilian employers from the large public sector which includes federal, state, and local governments down to the real source of our national wealth, the small business entrepreneur. However, the VFW strongly supports a requirement that all firms or companies that employ less than 50 persons be exempt from VRR. Again, the VFW thinks this is both a proper and equitable cut-off where the rights of reemployment for veterans must give way to common sense and not stifle the initiatives of the smallest start-up firms or those that have an extremely limited marketplace and/or pool of investment capital. The real point is that if veterans comply with the requirement of this bill they will not have to worry about having a job when returning from active duty and they know they will have the full backing of the federal government to enforce their reemployment rights. The five VFW suggestions were offered with the intent of reinforcing this overall philosophy.

This concludes the VFW's formal remarks. I shall be happy to answer any questions you or members of the committee may have. Thank you, Mr. Chairman.

PREPARED STATEMENT OF MAJOR GENERAL ROBERT F. ENSSLIN, JR., NGUS (RET.), EXECUTIVE DIRECTOR, NATIONAL GUARD ASSOCIATION OF THE UNITED STATES

INTRODUCTION

Mr. Chairman and members of the Committee:

The National Guard Association greatly appreciates the opportunity to present its views on S. 843, the "Uniformed Services Employment and Reemployment Rights Act of 1993", which would codify the scope of employment rights and benefits for individuals who serve voluntarily or involuntarily in the uniform services. We believe the inclusion of the Army and Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty is an important element of this legislation.

Events over the past few years have reinforced the need for the citizen-soldier to be available in the first line of defense of this nation. During DESERT SHIELD/DESERT STORM over 74,000 Army and Air Guard personnel were called to active duty. Some of these individuals were away from their civilian occupations for over a year. While this callup was unprecedented in recent history, within the changing world order we expect regional contingencies, the call for humanitarian assistance and peace keeping missions to place a greater burden on our military forces. We anticipate that the National Guard, as an integral part of the Total Force, will continue to be of vital importance in supporting the national military strategy requirements of this country in the future.

Without employer support and the assurance of continued employment, the National Guard and Reserve would be unable to

sustain a viable force. Even in time of peace, the amount of time away from civilian employment needed to meet required levels of training and to maintain unit and individual readiness continues to grow. With further programmed reductions of the active forces the reliance on the reserves will become even more important, thereby making the ability of the citizen-soldier to return to his civilian position a strong recruiting and retention tool.

The consensus of our members for some time has been that employer support and secure reemployment rights are essential to maintaining membership in the National Guard and Reserve. Employer pressure and spouse pressure have often been cited by Guard members as the leading reasons for leaving National Guard service. The proposed legislation should have a positive affect on retention of members of the Guard and Reserve by clarifying entitlements and responsibilities of both the member and the employer.

EMPLOYER ACTIONS

We are convinced that employers recognize the benefits they receive from the added quality of Guard experience. Overall, employers are supportive of the demands of military service. The response National Guard members received from employers during

and after operation DESERT STORM confirmed the overwhelming support of the business community. However, it is important for the future that the interests of both the employee and the employer be served by providing legislation that provides clear and concise guidelines for reemployment benefits.

As a result of operation DESERT SHIELD and DESERT STORM a significant numbers of employers have initiated programs that provide Guard and Reserve personnel and their families with continuing benefits during mobilization. Many have implemented or enhanced existing policies in order to offset the loss of civilian pay. However, all employees and employers will be better served by the proposed clarifications of legislative protections being proposed by the Congress.

VETERANS REEMPLOYMENT RIGHTS LEGISLATION

The bill that is under consideration by this committee is quite comprehensive. It starts out with the issue of discrimination in hiring and personnel actions. We recognize that protection from discrimination is difficult to legislate. This bill will make it even more clear that present or future service in the military, particularly National Guard and Reserve participation, may not be used as a negative distinction in employment decisions.

A second important aspect of this bill is the change in limitation of the cumulative length of time that an individual can be absent from a position of employment, with protection from

dismissal for other than cause, to five-years with certain exceptions. With military schools becoming more sophisticated because of highly technical equipment and the emphasis on the professional development of the reserve forces it is important that Guard personnel have the ability to attend the appropriate schooling to maintain their technical and tactical skills with the knowledge that they can return to their civilian job. A secure position in the workforce is an important factor when the individual considers possible callups for wartime and other contingencies when deciding to join or remain in the Guard.

One of the major concerns of Americans today is health care and its cost. For families that are already under stress during a military callup, the transition between military medical care and civilian care can be very disruptive. The assurance that health plan coverage will be continued as if the individual were on furlough or leave of absence to the extent that he or she is not entitled to care and treatment from the Federal Government will relieve a great burden on those called to serve their country.

The bill appears to be a reasonable balance of the needs of the employee and the employer. It protects the employer's interests by requiring an individual who is absent for more than 30 days to submit an application for reemployment within 14 days

of completion of service, and for those absent for more than 90 days to provide documentation regarding his or her service.

A House version of the bill, HR.995, also provides many similar protection benefits for members serving or called to active duty. The National Guard Association is hopeful that differences between the Senate version and the House version can be worked out to provide both the individual and the employer fair and equitable protections when an individual is called for military service.

Two areas where we feel changes should be made in S. 843 are in Sections 4312(a) and Section 4313 (a). First the House version of Section 4312 (a) would allow for an exemption of temporary hire employees from the provisions of this Act while the Senate has no such exclusion. We would support compromise language that would allow a temporary hire employee to return to his position when the period of service with the armed forces is of short duration. Second, in Section 4313 (a) the Senate provides specific guidance for first priority for reemployment for a person who was absent for less than 31 days, while the House version provides first priority of reemployment to individuals who's service was less than 91 days. We support the House version which would ensure that the individual knows that he can be called up for short periods of time, 90 days or less, and still return to the position in which he would have been employed at that time.

Both the Senate and House bills provide new sections which address elements of employer benefit plan contributions. The two versions, Senate 4317(b)(4) and House 4316(b)(1)(B) differ greatly. It is the view of the National Guard Association that a compromise between the two versions, that would allow for allocation of voluntary contributions and forfeitures could be provided in a manner that would benefit both the employee who has a vested interest in his pension and the employer who responsible for managing the pension fund.

CONCLUSION:

We applaud the actions of this committee in updating legislation on veterans employment and reemployment rights. Passage of an enhanced veteran's reemployment rights bill will assist in the transition of Guard and Reserve personnel returning from military duty to their previous civilian occupations with a minimum of disruption. All veterans to include those citizen-soldiers and airmen who answer the call to serve their country deserve every consideration in paving the way for their return to their civilian employment. This bill will help to ensure that transition to and from military service is conducted in a fair and equitable fashion for both the military member and the employer.

PREPARED STATEMENT OF LIEUTENANT COLONEL JAMES RODENBERG, USAF (RET.), LEGISLATIVE COUNSEL, RESERVE OFFICERS ASSOCIATION

Mr. Chairman and Members of the Committee: On behalf of the many members of the Reserve Officers Association, representing each of the uniformed services, I appreciate this opportunity to present to the committee the association's views on the proposed revisions to Veteran's Reemployment Rights legislation.

First, I want to commend the committee for responding to the needs of Reservists who when called to active duty must be concerned as to whether or not their jobs will be waiting for them when they are released from serving. Reemployment rights, or the ability of an individual Reservist to continue his or her employment with a civilian or governmental employer, are critical to recruitment and retention in the reserve components and thereby are essential to the success of the Total Force.

Related to a basic right of reemployment are protections for seniority, status, employee's pay rate and pension and health care benefits that can be affected by a callup. Reservists routinely make sacrifices as a part of their service, and left without strong employment and reemployment protection, few would be able to continue to serve.

Reemployment rights take on new meaning as the Administration and the Congress call on Reservists to play an even greater role in the nation's defense. During Operation Desert Shield/Desert Storm, the reserve components proved remarkably that they are responsive and effective. They brought to the Gulf War an outpouring of public support that could not have been generated without their activation. The cost-effectiveness of the reserve components has long been recognized. But unless Reservists are assured reemployment rights, these cost-effective forces will not be available when needed.

To appreciate the magnitude of this issue and the importance of reemployment rights, it would do well to consider the Desert Shield/Desert Storm experience. More than 230,000 Reservists were activated for Operations Desert Shield/Desert Storm, and approximately 106,000, or about one fifth, of the men and women deployed to the Persian Gulf theater were members of the Guard and Reserve. The time served and the circumstances varied among those who participated, but reemployment rights were critical to a majority of those activated.

The importance of employment protection was reflected in the great number of calls ROA received from Reservists who were ordered to active duty and from Reservists who anticipated being activated for Operation Desert Shield/Desert Storm. Reservists had a lot of questions relating to the callup, but many of their questions related specifically to reemployment rights. Calling the Association, also, were employers, the press, and many personnel consulting firms who had questions regarding the law.

83-460 O - 94 - 4

Statutory employment or reemployment protection is crucial to the ability of the reserve components to attract and retain qualified personnel. Having stated what may seem to be obvious, I would caution the committee that the law or any changes to the law must be clear and unambiguous. In order to protect the rights of the Reservist—and the rights of the employer—the statutes must be easily interpreted and understood.

I would also caution that legislation has its limits. It would be unwise and impractical to try to anticipate every circumstance and provide a legislative solution in each case. Laws that go too far in protecting the rights of the employee may in the end be counterproductive. Statutory protections provide a foundation for the necessary cooperation of employers, but statues are no substitute for good will.

The Congress has consistently supported the view that, "The support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force." Legislative initiatives should foster the enthusiastic voluntary cooperation and support of employers.

A member of the House Veterans Committee staff remarked recently that the House used as a guiding principle: "Treat returning veterans as if they had never left." The same principle can be said to have guided the Senate in most areas. A first impression might be that this principle seems to give too much weight to the needs of the Reservist employee. Favoring the needs of the Reservist is worth further consideration.

Reservists, as a part of the Total Force, provide this nation a defense capability that it could otherwise not afford—the cost of an all-active force would be significantly increased. The Guard and Reserve are thus good investments. Through their support of Reservists, employers contribute to our nation's defense—a fact that should be satisfying to employers—and they enable the government to spend fewer tax dollars on defense, indirectly lowering the employer's tax bite.

Employers of Reservists often benefit in another way which may be intangible but real. Reservist make good employees! They come in all sizes and shapes—they possess different training, skills, and work ethics—but most employers recognize that they get their money's worth in hiring Reservists. More often than not, Reservists are stable, hardworking, trainable, skilled employees. Having dual avocations, Reservists are rarely lacking in ambition. They exhibit a loyalty to their friends and fellow workers, their communities and their country. They are normally more mature and fiscally responsible. Reservists often bring to the workplace useful training and skills acquired in the military. It is difficult to put a price tag on these attributes, but they can be exceptionally valuable. Many employers are well aware of the bargain that is theirs when they hire a Reservist.

Given their contribution to the nation's economy and defense, and given the fact that Reservists make valuable employees, is it unreasonable then to "treat returning veterans (Reservists) as if they had never left?"

Before considering specific provisions of the legislation being considered, I want to address two general concerns, one relating to the administration and enforcement of reemployment laws and the second relating to exemptions.

In the past, administration and enforcement of reemployment laws have suffered because there has been no one agency responsible. The responsibility for reemployment rights of federal workers is particularly lacking. The division of responsibilities often frustrates and delays compliance and the resolution of infractions of the law. It further makes it very difficult to fix responsibility for enforcement. We know the committee has considered this problem, but it continues to be a concern.

During the consideration of this legislation by the 102nd Congress, there were efforts made by representatives of small business groups to exempt small business from some of the provisions, particularly provision having to do with disabled employees and health care benefits. It must also be noted that some of the objections voiced last year were based on spurious information or misinformation.

While ROA appreciates the concerns of small businessmen, any small business exemption would effectively strip the bill of its effectiveness for a large number of Reservists. A great many members of the Guard and Reserve are employed by small businesses, and their exemption would have a significant negative impact on recruitment and retention. This is a part of the price small businessmen must pay to have the skills and capabilities Reservists bring to the workplace. And while their profits may be negatively affected, there is some satisfaction in knowing that they have contributed to national security.

ROA applauds the efforts made to clarify terminology and to simplify existing provisions through the changes contained in S. 843. The use of "uniformed services," and by defining them to include the "United States Army, navy, Air Force, Marine Corps, and Coast Guard, including the reserve components," clearly brings all of the services and their reserve components under the protection of the law. This is a needed clarification.

Appreciated also is the protection S. 843 would provide temporary employees. During Operation Desert Shield/Desert Storm, ROA became aware of an instructor who had been employed by a university for 12 years but whose status was that of a temporary employee. This individual deserved protection but was very concerned that she would not be able to get her job back following the Gulf War.

Additionally, ROA applauds the Senate's protection of a US employee of an American controlled employer and agrees with the Senate's provision of first priority for reemployment if the absence is less than 31 days.

The ability of all Reservists to elect continued employer-sponsored health care coverage for up to 18 months is a critical provision of this legislation. Given the acute need for adequate health care and today's costs, this provision is of particular concern to many Reservists. We believe that requiring the individual to pay no more than 102 percent of the full premium for the coverage when the employee is absent for more than 31 days is fair for the employer and the employee.

Pension benefit plan contributions are also of particular interest to the association. Regarding the employer's contribution, ROA adheres to the principle that the returning Reservist be treated as though he had never left. Earnings should be credited with respect to an employer contribution in the same manner and to the same extent as earnings are credited to other employees during the period of service, irrespective of when the contribution is made.

ROA concedes that the employer could be required to use his own funds to make up the full contribution when he could not anticipate the return of the employee, but this precludes the employer's use of earnings which would be credited to the employee's account when the employer has every reason to expect the return of the employee. Complaints that computations of earnings are complicated and difficult, while not entirely unjustified, are not sufficient justification for not contributing earnings which would have been his or hers if the employee had not been absent to serve in uniform.

In conclusion, I want to say that we believe that this legislation generally will do much to clarify and improve uniformed services employment and reemployment law, and ROA greatly appreciates the effort that has been consumed by this revision.

Again, thank you for having provided this opportunity to comment on this legislation. I will be happy to answer any questions that you might have.

STATEMENT OF CHIEF MASTER SERGEANT BOB MILLER, USAF (RETIRED), LEGISLATIVE AFFAIRS MANAGER, AIR FORCE SERGEANTS ASSOCIATION

Mr. Chairman and distinguished members of the Senate Committee on Veterans' Affairs, the Air Force Sergeants Association truly appreciates having this opportunity to present its views on behalf of our 167,000 members and all active duty, retired and veteran enlisted personnel of the Air Force, Air National Guard and Air Force Reserves. We recognize the tremendous effort that the committee members and staff have made on behalf of the Nation's veterans. We sincerely thank you for those efforts, particular with regard to the issue of Employment and Reemployment rights which is the subject before you today. AFSA is very pleased to see your persistent determination to enact adequate legislation on this issue. S. 843 is a good bill and we encourage its approval by this committee and subsequent passage by the Senate.

In conjunction with our review of S. 843, we compared it with the provisions of the House version, H.R. 995. While there are many differences, most are minor and do not justify specific attention by our testimony. However, there are a couple of areas in which we have significant concern. It is with the following areas that we ask the Committee to make adjustments in the provisions of S. 843 before reporting it to the full Senate:

In the area of employee pension benefit plans, the current provisions of S. 843 do not adequately protect our returning service members. Therefore, we urge you to amend Sec. 4316 to include the following language:

"An employee entitled to pension benefits under this chapter,

(1) shall have earnings credited with respect to an employer contribution in the same manner and to the same extent as earnings are credited to other employees during the period of service subject to paragraph (3), irrespective of when the contribution is made:

(2) shall have allocated the amount of—

(a) any employer contribution that was voluntary;

(b) any employer contribution the total amount of which was determined without reference to the number of, or compensation of, plan participants before being allocated to the accounts of participants; and

(c) any forfeiture,

in the same manner and to the same extent the allocation occurs for other employees during the period of service."

With regard to rights and benefits provided by statute when there is no practice or agreement in effect, change that portion of Section 4316 (c) that reads ". . . pay 102 percent of the full premium. . ." to read ". . . pay 100 percent of the full premium. . ."

The period of protection from discharge upon reemployment, except for cause, make the following addition to Sec. 4316 (d) "a period of protection equal to period of service if the period of service was less than 31 days."

This concludes our statement. Thank you for considering AFSA's views.

STATEMENT OF COLONEL ERIK G. JOHNSON, JR., USA RET., DIRECTOR OF LEGISLATIVE AFFAIRS, ASSOCIATION OF THE UNITED STATES ARMY

Mr. Chairman and Members of the Committee:

The Association of the United States Army (AUSA) is a private, non-profit, educational organization whose members -- civilian and military -- join in supporting all aspects of national security with emphasis upon the Total Army and especially upon the men and women who serve. It is the only professional organization supporting the Total Army -- the Active -- the Army National Guard -- the Army Reserve -- Department of the Army Civilians -- the Retired, and their family members. Our objectives are public education about the Army, professionalism within the Army, industry liaison in support of the Army and people support for those in the Army.

On behalf of our membership, AUSA appreciates this opportunity to express its views concerning the Uniformed Services Employment and Reemployment Rights Act of 1993.

The committee is commended for presenting a comprehensive bill which would prohibit employment or reemployment discrimination against persons who serve in the uniformed services. Veterans' reemployment rights is a timely issue because of the rapid down-sizing of the Armed Forces and the Nation's increased reliance on reserve component forces to meet world-wide contingencies.

In its January 1993 report on reserve component programs for Fiscal Year 1992, the Reserve Forces Policy Board stated that, "Based on

experience gained from working with thousands of returned Reservists, the observation of the National Committee for Employer Support of the Guard and Reserve (NCESGR) Ombudsman is that the overwhelming majority of Reservists called to active duty from civilian employment were promptly reinstated following release from military service. In most cases where conflicts occurred, resolution was quickly achieved either through the informal efforts of NCESGR headquarters and volunteer state committee ombudsmen, or through formal assistance from the U.S. Department of Labor and other Federal agencies." Having said that, the report went on to say that there are certain changes which need to be made if America is to honor its commitment to our veteran population.

AUSA agrees with the Reserve Forces Policy Board and your proposed legislation that elimination of certain confusing aspects of employment are required if we are to protect those who serve in the defense of this great nation.

Both bills being discussed today accurately reflect two important concerns for most Americans, health care and pension benefits. These two issues were hotly debated during the last national election and have remained at the forefront in the electorate's consciousness.

We believe that continuation of health benefits is an important entitlement in any employment or reemployment act. Currently, the Department of Defense offers transition health benefits under a contract with the Mutual of Omaha Insurance Company. Although the insurance is both

expensive and limited it does meet the requirements of the Consolidated Omnibus Budget Reconciliation Act (COBRA). We can do better than that by adopting the provisions you have suggested. Simply stated, we need to ensure that our veterans are able to return to their original place of employment, and that once there they are covered immediately by the employer's health program rather than a separate policy that shifts the heaith care responsibility to the employee. It is important that the government retain responsibility for a pre-existing medical condition caused by military service. Treatment required beyond the service date should be the obligation of the employee's reinstated health plan.

Continuation of health benefits is an important consideration when initially called to active service from a reserve component. We agree that there is a need to indemnify service personnel who may not be entitled to medical care after release from active duty for problems not deemed to be service connected. Federal law already requires employers to continue coverage for 18 months after leaving employment. However, the employee is called upon to carry the entire cost of insurance, which can be up to 102% of group insurance costs. In a medical sense, we need a law that meets an important credo of the Hippocratic Oath -- first, do no harm. Applied to veterans that tells us to do no harm to the person who joins or is called to service in the Armed Forces of the United States.

The determination of pension benefit plan contributions is likewise a contentious issue. Once again, we should be guided by the desire to do no harm. Present law permits the employer to continue contributions to

pension benefits in the same manner and to the same extent as credited to other employees during the period of service. We agree with your proposed legislation that an "individual must be treated as not having incurred a break in service...(and) service in the uniformed services would be considered service with the employer for vesting and benefit accrual purposes." There have been suggestions that a returning employee should be entitled to earnings that would have accrued during the period of absence. While this idea would be laudable in terms of crafting a liberal employment/reemployment act, it would be particularly onerous to employers in its application. Additionally, it would have the potential of creating a problem when factoring in the increases and decreases of market forces during extended periods of service.

In respect to adverse tax or other consequences under the Internal Revenue Code (IRC) related to the employee's participation in a pension plan, the Association agrees that the VRR Act should provide the protections described in section 4317 (d) of S.843. Your solution to potential IRC problems is correct in granting protection to the plan, participant, or employer.

We believe a word of caution is needed here. While we stand in the forefront of those who advocate veterans' reemployment rights, care in crafting these rights must be exercised lest we make hiring military reservists too costly or too administratively burdensome for the private employer.

Not only should the VRR law be crafted to provide equal protection to employee and employer, the law should strive for simplicity. When passed, it must receive wide distribution among servicemembers and employers as well. Health and pension benefits are difficult for the lay person to interpret. We hope that the Department of Veterans' Affairs and Department of Labor will give wide distribution to this topic, in an easily understood publication, to employer and veterans.

STATEMENT OF THE DIRECTOR OF CENTRAL INTELLIGENCE

The Director of Central Intelligence

Washington D.C. 20505

8 July 1993

The Honorable John D. Rockefeller IV
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for providing me the opportunity to submit comments on S. 843, the proposed "Uniformed Services Employment and Reemployment Rights Act of 1993."

The Intelligence Community is supportive of S. 843, the purpose of which is to both improve the reemployment rights and benefits of veterans and/or reservists and to provide enforcement mechanisms to resolve issues involved in Federal reemployment cases. I assure you that the Intelligence Community agencies do not discriminate against veterans and/or reservists. In fact, individuals with military experience are frequently hired by agencies within the Intelligence Community because such a background often serves the needs of the hiring agencies. Moreover, if the experience of Operation Desert Storm is any indication, Intelligence Community agencies sometimes confer benefits upon returning reservists beyond those that would be mandated by the proposed legislation.

The Department of Labor and the Merit Systems Protection Board are given broad enforcement powers under this Act. Ultimately, judicial review is available. The alternative approach for the Intelligence Community, however, consists of Inspector General and agency head review with a congressional reporting requirement, in lieu of Department of Labor and MSPB/judicial enforcement. I appreciate the Committee's recognition of the importance of providing an alternate enforcement procedure for the Intelligence Community. The alternative approach provided by section 4315 maintains continuity with our current legal framework by protecting

The Honorable John D. Rockefeller IV

from outside review both hiring and firing decisions in the national security context and existing Intelligence Community agency personnel practices and procedures in national security matters.

It is important to retain subsection 4315 or a closely comparable provision in any veterans' reemployment legislation passed by this Congress. Although it is very unlikely that a returning veteran or reservist would not be reemployed by an Intelligence Community agency, it is possible that a situation could occur where the reemployment of a returning veteran or reservist would be against the interests of the national security. For example, a sensitive matter, such as the handling of classified information while in active duty status, could conceivably raise such serious security issues that reemployment would not be in the interest of the United States.

We have been advised that the Department of Labor has suggested some modifications to subsections 4315 and 4324. These modifications, which are enclosed, are consistent with the intent of the bill as currently drafted and I have no objections to these changes.

The Office of Management and Budget has advised that there is no objection to the inclusion of this letter in the legislative history of the proposed "Uniformed Services Employment and Reemployment Rights Act of 1993."

I again thank you for the opportunity of presenting comments on this proposed legislation.

Very respectfully,

Bill Studeman

William O. Studeman
Admiral, U. S. Navy
Acting

Enclosure

Department of Labor would modify subsections 4315 and 4324 as follows:

"§ 4315. Reemployment by certain Federal agencies

(a) Nothing in this section, section 4313, or section 4324 shall be construed to relieve any agency from compliance with the substantive provisions of this chapter.

(b)~~(a)~~ The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 shall prescribe

~~(1) the conditions under which persons who are absent from positions of employment with such agency by reason of service in the uniformed services shall be reemployed by such agency, and~~

~~(2)~~ procedures for ensuring that the ~~persons who satisfy such conditions are reemployed by such agency~~ rights under this chapter are implemented.

(c)~~(b)~~ In prescribing ~~conditions and~~ procedures under subsection (b) ~~(a)~~, the head of the agency shall ensure ~~to the maximum extent practicable~~ that

"~~(1) the conditions under which persons shall be reemployed by the agency are similar to the conditions for the entitlement of a person to reemployment rights under section 4312 of this title, and~~

"~~(2)~~ the procedures for reemployment of such persons provide for the reemployment of such persons by the agency in a manner that is similar to the manner described in section 4313 of this title.

(d)~~(c)~~(1) In prescribing such ~~conditions and~~ procedures under subsection (b)(e), the head of the agency shall designate an officer of the agency who shall determine if the reemployment of a person by the agency under this section is impossible, unreasonable, or not practicable.

"(2)(A) Upon making a determination that the reemployment of a person under this chapter is impossible, unreasonable, or not practicable, such officer shall

notify such person and the Director of the Office of Personnel Management of such determination.

"(B) The head of each agency shall, on an annual basis, submit to the Select Committee on Intelligence of the House of Representatives a report of the number of persons whose reemployment with the agency was determined to be impossible, unreasonable, or not practicable during the year preceding the report and the reason for each such determination.

"(C) A determination under paragraph (1) shall not be subject to judicial review.

"§ 4324. Enforcement of rights with respect to certain Federal agencies

"(a) This section shall apply to any person who alleges that

"(1) the reemployment of such person by an agency referred to in section 4315(a) of this title was not in accordance with the procedures for the reemployment of such person prescribed under such section; or

"(2) the failure of such agency to reemploy the person under section was wrongful.

(b) Any person referred to in subsection (a) may submit a claim relating to the allegation to the Inspector General of the agency. The Inspector General shall investigate and resolve the claim pursuant to procedures prescribed by the head of the Agency.

"(c) The head of each agency referred to in section 4315(b)~~(a)~~ of this title shall prescribe procedures for the investigation and resolution of allegations submitted under subsection (b). In prescribing procedures under this subsection, the head of the agency shall ensure, to the maximum extent practicable, that the procedures are similar to the provisions relating to the investigation and resolution of a claim by the Secretary under section 4321(d) of this title.

"(d) Nothing in this section or section 4315 shall prohibit: (1) employees of such agencies from seeking information from the Department of Labor regarding any matter under this chapter or assistance in requesting reemployemnt or alternative employment, or (2) such agencies from voluntarily cooperating with or seeking assistance or of clarification from the Department of Labor or Office of Personnel Management in any matter arising under this chapter.

STATEMENT OF MICHAEL P. CLINE, MASTER SERGEANT (RET), EXECUTIVE DIRECTOR, ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE UNITED STATES

Mr. Chairman and members of the Committee: Thank you for this opportunity to present to this distinguished Committee the views of the Enlisted Association of the National Guard of the United States with respect to the amendments to Title 38, United States Code, regarding Veterans' Reemployment Rights.

This particular act is of special interest to me. As the Executive Director of EANGUS, I'm providing testimony on behalf of all enlisted members of the National Guard, as well as for my wife who is an Active National Guard member. I am personally interested in the provisions that she would be afforded under these amendments if she were called to active duty.

Opinions of Our Association Concerning the Amendments

We at EANGUS would like to recognize the efforts made to amend Title 38, Chapter 43, of the U.S. Code. Approximately 560,000 National Guard members are prepared to defend our nation. More than 450,000 are enlisted members and these amendments could not have been more timely than they are right now. Specifically, the number of Army and Air National Guard units and Guard members called to active duty for Desert Storm are as follows: 343 units of the Army National Guard comprised of 56,538 enlisted soldiers; 74 units of the Air National Guard comprised of 4,826 enlisted airmen. Additionally, thousands of other Guardmembers are serving in various capacities around the world supporting Saudi Arabia, Bosnia, and Somalia.

Without employer support and the assurance of continued employment, the National Guard and Reserve will be unable to sustain a viable force. The impact of increased amounts of time away from civilian employment needed to meet required levels of training and to maintain unit and individual readiness was apparent long before DESERT SHIELD/STORM.

Employer Actions

We are convinced that employers recognize the benefits they receive from the added quality and leadership of National Guard member bring to the work place. Overall, employers are supportive of the demands of military service. Even so, the generosity of employers since the beginning of Operation DESERT SHIELD has truly been overwhelming.

A significant number of employers have initiated programs that provide Guard and Reserve personnel and their families with continuing benefits. Many have implemented or enhanced existing policies in order to offset the loss of civilian pay.

At the same time, these employers are also trying to cope with the obvious hardships that the losses to the work force have created

within their businesses. In the short run, most employers can improvise. It is the long-run and the future that are best served by legislative protection for the employee and the employer.

Veterans' Reemployment Rights Legislation

The bill that is under consideration by this committee is quite comprehensive. Issue that are frequently discussed are:-discrimination in hiring and personnel actions. There is a strong perception that discrimination is prevalent, although subtle. We recognize that protection from discrimination is difficult to legislate. Employment decisions are frequently made by discerning between equals. This bill will make it even more clear that present or future service in the military, particularly National Guard and Reserve participation, may not be used as a negative distinction in employment decisions. To maintain a quality force, the National Guard must recruit from the same pool of talented leaders and skilled workers that are attractive to civilian employers. It is important that employees and the military work together, rather than in competing with?

Response to Summary of Difference Between H.R. 995 and S. 843

1. Extra-Territorial Coverage—EANGUS concurs with the Senate provision Section 4303(3)(B), 4311(d), and 4311(e) which would provide for VRR coverage in a foreign country if an employee is a U.S. Citizen and the employer is in American controlled company. This broadens the coverage of reemployment rights.

2. Temporary Positions—EANGUS does not concur with the House provision. If an individual is called to Active Duty, he/she should be protected whether he/she is a regular or temporary employee. Individuals who take new jobs may find themselves classified as temporary employees for long periods of time. Should they be penalized because their Country needs them? No!

3. Documentation—EANGUS concurs with the Senate provision Section 4312(f)(3)(B) which would provide similar latitude regarding documentation needed for reemployment. However, we would add that an employer who has an employee absent for more than 90 days due to military service may require the person to provide proper documentation before beginning to treat the person as not having incurred a break for pension purposes.

4. Reemployment Positions—EANGUS concurs with the House provision Section 4313(a) which provides first priority for reemployment for a person whose military service was less than 91 days, the position in which he/she would have been employed if his/her employment had not been interrupted by service in the uniformed services. A like position would be provided if the employee is absent for more than 90 days. This provision provides broader protection.

5a. Federal Executive Agency Employee—EANGUS has no position on this provision.

5b. EANGUS does not concur with either the House or Senate provisions. National Guard Technicians are normally competitive employees and therefore could be excluded from reemployment rights based on a technicality if it is impossible to return to reemployment. Federal Employees should have the same protection as members of the civilian work force.

5c. Federal Security Agency—EANGUS has no position on this provision.

6. Rights and Benefits under Practice or Agreement Related to Others on Furlough or Leave of Absence—EANGUS concurs with the Senate provision, except paragraph 4. It should read the same as the 5 year service provision. Section 4316(b) would provide for similar rights and benefits relating to others on furlough or leave of absence but with the following limitations—

- Paragraph (2) would provide that a person is not entitled to coverage under a health plan to the extent the person is entitled to care or treatment from the Federal Government as a result of the person's military service.
- Paragraph (3) would provide that a person is not entitled to coverage, under a life insurance policy as a result of armed conflict to the extent such coverage is excluded or limited by a provision of the policy.
- Paragraph (4) would provide the requirement that an employer provide rights or benefits to a person deemed to be on furlough or leave of absence which expires the earlier of 18 months or the date the person completes military service.

EANGUS concurs with the Senate provision with the following exceptions: Section 4316(c) should be the actual cost, not 102%. This imposes a penalty on the Enlisted member who needs the coverage the most.

Section 4316(c)(1)(c). Should be for the duration of time served.

Section 5315(c)(2). EANGUS concurs.

7. Period of Protection from Discharge upon Reemployment, Except for Cause—EANGUS concurs with the House provision. Often the needs of military service are less then 31 days. These individuals should have the same protection as the employee who serves 31 days or more.

Section 4315(d) would provide—

- One year protection from discharge, if the period of military service was 181 days or more.
- Six months protection, if period of service was 31 days or more, but less than 181 days.
- A period of protection equal to the period of service, if the period of military service was less than 31 days.

8. Use of Civilian Leave—EANGUS concurs with Senate provision. Section 4316(e) would provide similar leave utilization, but—

- Would not exempt temporary position from coverage.
- Would require an employee to make a request for leave.
- Would limit leave that may be utilized as vacation or annual leave with pay that has accrued before the commencement of military service.

9. Multiemployer Pension Benefit Plans—EANGUS concurs with Senate provision Section 4317(b)(2) which would provide for a similar allocation of employer liability when the plan so specifies. However we would add that if the sponsor does not provide a plan, the liability will be allocated to the last employer employing the person before the period of military service.

10. Pension Benefit Plan Contributions—EANGUS concurs with the Senate provision. Undue hardship should not be placed on the employer.

a. Limitation of contribution amount—Section 4317(b)(2) would provide a similar limitation on the person but would limit the employer's amount as well.

b. Elements of employer contribution—EANGUS concurs with the House provision. It is unfair to punish someone because they were rehired under the VRR Law as proposed by the Senate provision. Section 4316(b)(1)(B) would provide that an employer must—

(1) Credit to an employee the earnings of the employer's contribution during the period of military service, irrespective of when the contribution is made;

(2) Allocate the amount of any employer contribution that was voluntary; and

(3) Allocate the amount of any forfeitures in the same manner and to the same extent the allocation occurs for other employees during the period of military service.

c. Computation of liability and contributions—EANGUS concurs with the House provision. In most cases, Junior Enlisted members will be unable to repay the contribution if it escalated. Section 4316(B)(3) would provide that for purposes of computing employer's liability or employee's contributions to the pension benefit plan, the employee's compensation during the period of service will be computed at the same rate as the employee received from the employer immediately before military service.

12. Pension Benefit Protection—Section 4317(d) would provide that no provision of the VRR Law requires any action to be taken which would cause the plan, participant, or employer to differ adverse tax or other consequences under the IRS, or requires contributions to be returned, or additional contributions to be made, with respect to employees not reemployed.

13. Enforcement of Rights—EANGUS concurs with both the House and Senate provision. Section 4322(c) would provide that if the Secretary of Labor's efforts to obtain voluntary compliance are not successful, and if claimant makes a written request that the claim be referred for litigation, the Secretary will refer it. Section 4321(e), although organized differently than House Bill, would provide similar enforcement rights, with an additional requirement. If the Secretary's efforts to obtain voluntary compliance are unsuccessful, the Secretary must notify complainant of results of investigation and entitlement to proceed.

14. Venue—EANGUS concurs with Senate provision Section 4322(b) which specifies the appropriate Federal district court for when actions are taken against a State that is an employer or against a private employer.

15. Office of Special Counsel—EANGUS concurs with Senate provision Section 4323(e) which provides that a person may be represented by Special Counsel, unless the person was not represented by Special Counsel before the MSPB.

16. MSPB Award—EANGUS concurs with Senate provision except in regards to Federal executive agencies. All federal employees deserve coverage. Section 4323(c)(4) would provide the MSPB with similar authority to enter an order, except—

- Only with regard to Federal executive agencies, and;
- In its discretion, the MSPB may award the person reasonable attorney fees, expert witness fees, and other litigation expenses.

17. Subpoenas—EANGUS concurs with Senate provision Section 4323(b) and 4323(c) which would provide that except in the case of the Federal Government as an employer, the Secretary of Labor may require by subpoena, the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. Federal district courts would have the jurisdiction to enforce the subpoena. This would not exempt the Federal Government as an employer.

18. Regulations—EANGUS concurs with the House provision Section 4331(b)(1) which provides that employees of the Federal Government may be given greater or additional rights in regulations than State or private sector employees.

19. Reports—EANGUS concurs with the House provision. Continual updating of VRR laws are an important guarantee of rights for Enlisted Men & Women in uniform. Section 4332 would require an annual report to Congress on activity under the VRR law and recommendations for administrative or legislative action necessary for effective implementation.

Section 2(c) would require a onetime report on implementation.

20. Revision of Federal Civil Service Retirement Benefit Program for Reservists—EANGUS concurs with Senate provision Section 5 which provides for an adjustment of the payment cap for Reservists

who are Federal employees to ensure that their amount of payment for a period of military service may not exceed the amount that would have been deducted for a period of civilian service if the employee had not performed the military service.

21. Effective Dates—EANGUS concurs with the Senate provision Section(e) which provides that the employee pension benefit provision of the new VRR law will apply to reemployment initiated on or after August 1, 1990.

Topics for Further Enhancement of the Amendments

Although we support the majority of the specifics of the amendments proposed, we would like to point out some areas that are of concern to us.

We would like to see companies that are complying with the Statute be rewarded in some way. Tax breaks for such companies would not only offer a great incentive for companies to comply freely with the Statute, but would also help to promote the hiring of more military-related employees, which is the stated purpose of this document. Reemployment rights need to protect both the employer and the employee. Most of all, these rights need to be in the best interest of our Nation's defense.

Other questions being posed to you are:

1. What happens to Guard members or Reservists who return home to find that his/her company has been sold to or merged with another company? *We believe that the company owner has a responsibility to inform the new owner of any persons that would require reemployment under this act.*

2. What happens to those individuals who work for a company under a "personal services contract"? *We want the employer to reinstate the employee in his/her position, if the contracted position still exists.*

3. Would the 5 year time period be cumulative? *EANGUS believes it should not be. As the down-sizing of the Active Military takes place, more emphasis will be placed on the Guard to fill the void when needed. During a 20 year military career, one could see several call-ups. Military Service for schools should not be counted as cumulative.*

Closing Statements

The National Guard and Reserve Components of the United States Armed Forces are a vital part of our Nation's fighting force. These brave men and women willingly volunteer to serve in the military, understanding fully that they may be called upon to fight for their country. The people of the United States should feel an obligation to ensure that these servicemen and women are taken care of when they return home from Active Duty.

More than 356 years ago our forefathers laid down their plows and went off to fight for what is now the greatest nation in the world.

When the need for their services were complete, they returned to their land and resumed life as before. Shouldn't our Guard members of today enjoy this same privilege?

Thank you for your time and patience. This concludes my statement. I will be happy to take any questions at this time.

STATEMENT OF THE ERISA INDUSTRY COMMITTEE ON S. 843 AND H.R. 995, "THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1993"

SUMMARY STATEMENT

The comments of The ERISA Industry Committee (ERIC) are limited to the impact of S. 843 and H.R. 995 on the provision of employee benefits.

ERIC's members historically have assisted and protected the employee benefits rights of individuals temporarily on military leave.

The provision of employee benefits is a voluntary action by employers. Thus, in order to protect the long-range well being of employees who serve in the uniformed services, the requirements of the law must not impose such demands on employers that employers cannot afford to offer, or otherwise are discouraged from offering, employee benefit plans.

During the 102nd Congress, ERIC supported the passage of the bill approved by the Senate on October 1, 1992. Some important provisions regarding health and welfare benefits that were included in the October 1 bill, however, are not included in S. 843.

In addition, we are very concerned that many of the provisions that appear in either the October 1, 1992, Senate bill or S. 843 are not included in the House-passed bill. We strongly urge the Senate to insist on *all* of the Senate's corrections in discussions with the House.

We ask that the Committee amend S. 843 to include the provisions that appeared in the October 1, 1992, Senate bill (but not in S. 843) that would:

- restrict health, life, disability, and other welfare benefits provided at employer cost for up to 18 months to an individual who leaves for military service to benefits that are—

  benefits to which the individual would have been entitled had the individual not left for military service, and

  benefits *generally* provided to other employees, and that are not based on benefits provided to employees on leave by reason of special circumstances relating to the occurrence of an event affecting the health of the employee or a member of the employee's family;

- limit the time that employers must bear the cost of providing benefits for employees who have voluntarily left for military service;
- allow an exclusion from employer-provided disability coverage for conditions incurred or aggravated as a result of the individual's military service; and
- provide for an exclusion from the health coverage of a reinstated employee for any condition determined by the Secretary of Veterans Affairs to have been incurred or aggravated in the line of duty.

It is important to recognize that the bill requires the provision of health coverage under three separate and distinct provisions:

- §4316(b) requires that benefits be provided *on an ongoing basis and at employer expense* if such benefits are provided to other employees on any form of leave.
- §4316(c)(1) provides for continuation health coverage *at the former employee's expense* similar to that provided under COBRA.
- §4316(c)(2) stipulates certain requirements concerning coverage *for an employee who has been rehired.*

Failure to recognize the separate impact of these three provisions has continued to create confusion about the impact of the proposed legislation on employer-sponsored plans, and health plans in particular. Reasonable accommodations, such as those listed above and others already provided in the bill, must be made *in each section.*

With the corrections noted in our testimony, we would support the bill.

FULL STATEMENT

Mr. Chairman and Members of the Committee, The ERISA Industry Committee (ERIC) is pleased to comment on "The Uniformed Services Employment and Reemployment Rights Act of 1993." As you requested, our comments are directed both to S. 843, as introduced on April 29, 1993, and H.R. 995, as passed by the House of Representatives. Our comments are limited to the impact of these bills on the provision of employee benefits.

ERIC is a non-profit employer association committed to the advancement of the employee retirement, health, and welfare benefit plans of America's major employers. ERIC represents the retirement security and employee benefits interests of more than 120 of the nation's largest employers. All of ERIC's members provide comprehensive benefit coverage to their employees. As sponsors of health, disability, pension, savings, life insurance, and other benefit plans directly covering approximately 25 million people, about 10 percent of the U.S. population, ERIC's members have a strong interest in the success and expansion of the voluntary private sector employee benefit plan system.

S. 843 and H.R. 995 amend chapter 43 of title 38 of the United States Code to improve the employment and reemployment rights of veterans and members of the uniformed services. ERIC believes it is appropriate to bring this law more in line with current practices. ERIC's members historically have assisted and protected the employee benefits rights of individuals who are temporarily on military leave.

In General

ERIC supports the intent of the legislation to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that otherwise might occur as a result of uniformed service.

At the same time, it is important for your Committee to recognize that the provision of employee benefits is a voluntary action by employers. Thus, in order to protect the long-range well being of employees who serve in the uniformed services, the requirements of the law must not impose such demands on employers that employers cannot afford to offer, or otherwise are discouraged from offering, employee benefit plans.

During the 102nd Congress, ERIC worked diligently with the Senate Committee on Veterans' Affairs to reach an agreement regarding appropriate legislation to amend this law. We supported the passage of that agreement by the Senate on October 1, 1992.

We are pleased that many of the important modifications included in the October 1, 1992, bill also are included in S. 843. Some important provisions regarding health and welfare benefits that were included in the October 1 bill, however, are not included in S. 843. These are specified below, and we strongly urge that these provisions be included in S. 843 when the legislation is approved by the Committee.

In addition, we are very concerned that many of the provisions that appear in either the October 1, 1992, Senate bill or S. 843 are not included in the House-passed bill. We strongly urge the Senate to insist on *all* of the Senate's corrections in discussions with the House.

S. 843

S. 843 includes important protections for pension plans that are not included in the House bill. Specifically, the Senate bill:

- makes it clear that the returning service person's pension rights are determined by the specific section delineating those rights (see §4316(b)(5)). This will prevent confusion in plan administration and is necessary to clarify that the new requirements regarding the provision of health and welfare benefits (under §4316) do not apply to employee pension and savings plans.
- makes it clear that earnings on plan contributions will commence at the time the contributions are made (see §4317(b)(4)). This is an absolutely necessary amendment, especially in

participant-directed account plans. Among other difficulties, the employer has no way to know what the actual plan earnings would have been. In addition, the approach taken in S. 843, unlike the approach in the House bill, is consistent with technical amendments to the Internal Revenue Code that are now pending in the Congressional tax committees.

- provides additional protection for pension plans until necessary conforming amendments to the Internal Revenue Code are approved by Congress (see §4317(d)). This is necessary to prevent plans from jeopardizing their tax-qualified status since several of the pension rights delineated in §4317 expand current law, and operation of a plan in accordance with those requirements would violate the provisions of the Internal Revenue Code. We have previously supplied the Committee with a detailed list of affected Code sections.

We continue to support these provisions of S. 843.

We ask that the Committee amend S. 843 to include the provisions that appeared in the October 1, 1992, Senate bill (but not in S. 843) that would:

- restrict health, life, disability, and other welfare benefits provided at employer cost for up to 18 months to an individual who leaves for military service to benefits that are—

  benefits to which the individual would have been entitled had the individual not left for military service, and

  benefits *generally* provided to other employees, and that are not based on benefits provided to employees on leave by reason of special circumstances relating to the occurrence of an event affecting the health of the employee or a member of the employee's family;

- limit the time that employers must bear the cost of providing benefits for employees who have voluntarily left for military service;

- allow an exclusion from employer-provided disability coverage for conditions incurred or aggravated as a result of the individual's military service; and

- provide for an exclusion from the health coverage of a reinstated employee for any condition determined by the Secretary of Veterans Affairs to have been incurred or aggravated in the line of duty.

It is important to recognize that the bill requires the provision of health coverage under three separate and distinct provisions:

- §4316(b) requires that benefits be provided *on an ongoing basis and at employer expense* if such benefits are provided to other employees on any form of leave.

- §4316(c)(1) provides for continuation health coverage *at the former employee's expense* similar to that provided under COBRA.
- §4316(c)(2) stipulates certain requirements concerning coverage *for an employee who has been rehired.*

Failure to recognize the separate impact of these three provisions has continued to create confusion about the impact of the proposed legislation on employer-sponsored plans, and health plans in particular. Reasonable accommodations, such as those listed above and others already provided in the bill, must be made *in each section* in order not to discourage employers from offering benefits to employees, especially to employees on leave. Without these limits, the cost of providing benefits to service persons can be substantial even to major employers. Excess costs easily can foreclose the options medium-sized and small employers have to offer benefits at all, especially to individuals on any form of leave such as maternity or sick leave who, unlike individuals in the military, have no other form of health insurance available. The cost impact can be especially severe in the case where temporary service in the uniformed services is concentrated in a particular community.

In addition, major employers often have many different benefit plans covering different divisions or different groups of employees. The bill's requirement that individuals on military leave be provided benefits received by "other employees" simply is too broad and will cause anomalous results. It could require an individual on military leave to receive benefits not available to any other person in that individual's division or group. For example, it could require union benefits to be provided to a serviceperson who had not been a union employee, and vice versa, or benefits from one company in a controlled group to be provided to individuals in another company in the controlled group. These results go well beyond the purpose of the legislation, and will cause confusion and resentment among employees and discourage the provision of employee benefits by employers, especially in leave situations.

We also reemphasize the importance of including exemptions from employer-sponsored plans, including disability plans, for conditions incurred or aggravated during military service.

Finally, we urge the committee to preserve the distinction set out in the October 1, 1992, bill between the health and welfare benefit rights accorded individuals who are called to duty (e.g., as part of a reserve unit) and those who have simply left the employer voluntarily as part of a career change and without an intent to return.

Specifically, we recommend that:

(1) §4316(b) of S. 843 be amended to conform more closely to the language of §4326(b) of the bill approved by the Senate on October 1, 1992,

(2) §4316(c)(1)(C) of S. 843 be amended to conform more closely to the language of §4326(c)(1)(C) of the October 1 bill, and

(3) §4326(c)(2)(B) of the October 1 bill be added to §4316(c)(2) of S. 843.

We note that there are many other issues that we have raised with the Committee over the past year. However, we believe that with the corrections specifically noted above, the bill will be sufficiently workable for employer-sponsored plans. Thus, if these corrections are made, we would support the bill.

H.R. 995

The House bill fails to make needed corrections that will ensure the continued provision of voluntary employee benefits to all employees, including those on military leave. The problems with the House bill are both considerable and substantive, and are outlined below. We strongly urge the Senate Committee not to accept the House bill under any circumstances.

(1) Entitlement to Benefits Available to Any Other Employee: §4315(b) of the bill states that employees who leave for military service must receive any benefit (including health coverage, disability coverage, life insurance, etc.) that is received by any other employee of the employer on any other kind of leave. The Committee Report (H.Report No.103-65 at p. 33) states that the individual on military leave must receive the *most favorable* benefit accorded any other employee on leave.

These requirements mean union benefits must be provided to a non-union employee on service-connected leave, or vice versa, if one package of benefits is more favorable than the other. The bill also would require that benefits from one line of business be provided to employees on military leave from another line of business. These requirements make little sense and will be confusing to employers and employees alike. The bill also could require that employees in lower-option plans be upgraded to higher-option plans while on military leave. This also is confusing, unnecessary, and, in the case of plans that require employee contributions, could significantly increase costs to military families just as their income is dropping.

Recommended solution: Amend the bill to clarify that individuals on military leave are not entitled to benefits they would not have been entitled to had they not gone on military leave.

(2) Ongoing Benefits: §4315(b) the bill requires the employer to provide benefits (*including health benefits*) on an *ongoing* basis for up to five years for servicepersons with as little as one hour of service with the employer. These benefits, furthermore, must be entirely employer-funded to the extent they are employer-funded for any other employee on any kind of leave.

The bill requires identical treatment for individuals who have left the employer to pursue a military career as for individuals who have been called to temporary duty and who fully intend to return to their former jobs. Although this distinction might not be as important in

a re-employment situation, it is very critical where ongoing benefit payments are being required.

Under current practice, employers generally continue benefit coverages for servicepersons on temporary, short-term active duty, but treat extended military leave as a non-paid leave without benefits. Individuals who leave the employer to pursue military careers are treated as former employees (with rehire rights as provided under the law but without benefit continuation except as required by COBRA).

The bill's significant expansion of current law and common practice will be costly to employers and virtually begs for abuse. It also sidesteps the federal government's duty to provide full and uniform benefits to servicepersons and their dependents who are on extended tours of duty. It is inappropriate to require an employer to provide individuals in the military with the benefits that the employer provides to employees who are on nonmilitary leaves: employees on maternity, sabbatical, education, and other forms of leave or on layoff are expected to return to employment at the end of the leave and, *unlike individuals in the military,* will not have any other benefit programs provided for them. If not curtailed, the bill's requirements will result in significant cutbacks of benefits for individuals on health-related leaves, such as disability leave and maternity leave, as well as other forms of leaves and layoffs, in order to limit the employer's financial exposure.

Recommended solution: The bill should dramatically reduce the overreaching impact of this rule by providing for exceptions such as those provided in the bill that passed the Senate on October 1, 1992.

(3) War Zone and Service-Connected Condition Exclusions/Benefit Offsets: §4315(b) and §4315(c)(1), in combination with §4302(b), override standard exclusions from coverage for service-connected injuries, disabilities or deaths. (§4315(c)(2), by contrast, does not require the employer's plan to pay for the health care costs of conditions incurred or aggravated in the service.)

In addition, it is unclear under §4315 whether employer-provided benefits mandated under the bill could be offset by benefits provided by the government to servicepersons and veterans. If this is not made clear, individuals may collect duplicate benefits.

Recommended solutions: Clearly provide for an exclusion for health benefits to the extent the individual is entitled to care or treatment from the Federal Government as a result of the individual's service in the uniformed services; for standard war-zone exclusions found in many life insurance plans, if the plan or policy so provides; and for exclusions under disability policies for conditions incurred or aggravated while in the service, if the plan or policy so provides.

(4) Investment Earnings: §4316 requires make-up contributions to a qualified plan to include investment earnings that otherwise might have been earned. This will be prohibitively expensive for some employers, will be impossible to administer, particularly in participant-directed individual account plans, and could harm the

returning veteran if the investment experience in the plan has been negative.

Recommended solution: Clarify that interest will accrue only after a contribution actually has been made.

(5) Reallocation of Forfeitures and Other Cash Contributions to Defined Contribution Plans: Some contributions are made to a defined contribution plan according to a formula based on the employee's compensation and years of service. Other contributions are not based on the employee's individual compensation but instead allocate certain amounts (for example, a percentage of the employers profits or the plan's forfeitures) among employees working at the firm at a particular time. Section 4316 of the bill would require employers to go back as far as five years and recalculate allocations made at a particular time in the past. This is an excessive requirement that will be impossible to satisfy since in many cases the recipients of these past allocations will have moved on to other jobs.

Under current law, employers provide retroactive accruals under defined benefit plans and provide service credit under all plans, but generally do not make retroactive cash contributions under defined contribution plans. Accruals under a defined benefit plan and service credits under all plans are provided so that an individual's military service does not jeopardize benefits based on length of service with the employer. As a practical matter, small employers and nonprofit employers may find a five-year contribution to a defined contribution plan so expensive that they will be forced to curtail or drop the plan. This protects neither the veteran nor the veteran's fellow employees. The provisions of the House bill exacerbate this problem.

Recommended solution: Conform the bill to the provisions of §4317 of S. 843.

(6) Coordination with Internal Revenue Code: §4316 of the bill requires contributions to pension and savings plans that could cause the plans to lose their tax-qualified status under any of several different provisions of the Internal Revenue Code and that would require them to rerun expensive nondiscrimination tests retroactively.

Recommended solution: Provide protection both against any incompleteness of the parallel amendments to the Internal Revenue Code pending in H.R.13 and against failure to enact those amendments before H.R. 995 becomes law by ensuring that no action is required under the bill that will cause the plan, participant, or employer to suffer adverse tax or other consequences under the Internal Revenue Code.

(7) Documentation: §4312(g)(3) of the bill unfairly requires employers to comply with its provisions even in the absence of adequate documentation of the affected individual's service status. This apparently would include, for example, documentation that the individual had been discharged from the service. This is unreasonable. A returning serviceperson who might not be eligible for reemployment because, for example, he or she had received an unfavorable discharge, could, under the bill, be reemployed, illegally

collect retroactive contributions to a defined contribution plan, and run up considerable health coverage expenses. While the bill allows the employer to fire the individual when his or her lack of eligibility became evident, recouping the pension and health expenditures, as a practical matter, will be difficult, if not impossible.

Recommended solution: Provide that an employer may require documentation before making retroactive pension contributions or paying health claims if the employee has been absent for more than 90 days.

(8) Continuation Coverage: §4315(c)(1) of the bill provides that the employer must provide a continuation coverage similar to that required under ERISA and the Internal Revenue Code (commonly called COBRA coverage) except that, unlike COBRA, the bill's provision extends to all employers of any size and to all forms of insurance, including disability insurance, life insurance, etc.

The provision is unnecessary and confusing. It will require employers with over 20 employees to have two sets of "COBRA" forms—one for servicepersons and their dependents and one for everyone else. Moreover, it could cause an employer covered under COBRA to violate the provisions of that law.

Recommended solution: Coordinate the coverage under the bill with COBRA coverage required under ERISA and the Tax Code.

STATEMENT OF FRANCIS X. CAVANAUGH, EXECUTIVE DIRECTOR, FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Mr. Chairman and Members of the Committee: I welcome this opportunity to discuss Thrift Savings Plan (TSP) benefits for Federal and Postal employees who separate or enter leave without pay status to perform military service and then exercise restoration or reemployment rights and return to Federal civilian employment.

The Thrift Savings Plan for Federal employees, which is administered by the Federal Retirement Thrift Investment Board, is a retirement savings plan for Federal and Postal civilian employees. Military personnel are not eligible to participate in the Plan.

Under present law, a Federal or Postal employee who separates or enters leave without pay status to perform military service ceases to accrue TSP benefits, and the law does not provide a way to make up for those lost benefits after the employee returns to civilian service. This benefit gap is inconsistent with the provisions of the underlying Federal civilian retirement systems, which have long provided retirement credit for military service.

After returning to civilian service, Federal and Postal employees who have performed military service are entitled to receive credit under the basic defined benefit retirement programs administered by the Office of Personnel Management (OPM). The period of military service is creditable under the Civil Service Retirement System

(CSRS), the Federal Employees' Retirement System (FERS), and other equivalent Government retirement plans.

Unlike these defined benefit programs, the Thrift Savings Plan for Federal employees is a "defined contribution" plan, similar to private sector retirement savings plans under Section 401(k) of the Internal Revenue Code. Eligible employees may make voluntary contributions by payroll deduction each pay period. FERS employees may contribute up to 10 percent of their basic pay each pay period to the TSP and receive matching Government contributions on up to 5 percent of their basic pay each pay period. FERS employees also receive an automatic Government contribution equal to 1 percent of basic pay each pay period, regardless of whether the employee makes a contribution. CSRS employees may contribute up to 5 percent of their basic pay each pay period to the TSP, but they receive no Government matching or automatic contributions. Under FERSA and in conformance with the requirements of the Internal Revenue Code, employee contributions may only be made as a deferral from current salary.

Thus, without new legislation to provide a method for making up benefits retroactively, employees would lose their TSP benefits for a period of military service unless it is covered by paid military or annual leave. This is especially important for FERS employees, for whom the TSP forms a significant portion of their total retirement benefits.

When I first testified on this issue on May 15, 1991, before the House Subcommittee on Compensation and Employee Benefits, I provided a technical analysis of the issues that would need to be addressed in developing legislation to provide TSP make-up benefits for periods when civilian service was interrupted to perform military service. S. 843 addresses all of the necessary issues and provides the authority needed to administer retroactive benefits. Additionally, we understand that future tax legislation may clarify the application of annual Internal Revenue Code limits to retroactive contributions made to plans like the TSP. Absent a change, those limits could prevent returning servicemembers from achieving full retroactive benefits.

I am also pleased to note that S. 843 allows the Board's current retroactive contribution process to be used in providing these benefits to returning servicemembers. Currently, retroactive contributions are authorized to correct errors by employing agencies and to implement the provisions of P.L. 101-508 regarding retirement system transfers of certain non-appropriated fund employees. Applying the existing administrative process to returning servicemembers will avoid unnecessary administrative complexity and ensure that all groups authorized to receive retroactive benefits are treated equitably.

In comparing S. 843 with its House counterpart, H.R. 995, we have noted two minor discrepancies in language affecting the TSP. First, we prefer the Senate bill's use of the word "subchapter" on page 41, line 12, because it better clarifies that the TSP is subject to existing judicial enforcement found at 5 U.S.C. 8477. Second, S. 843 attempts to clarify benefit entitlement for individuals who have returned to

civilian service prior to enactment at section 6(f)(4) beginning at page 62, line 10, without using the contingent language found in H.R. 995. However, the attempted clarification fails to cite the relevant date, which is located in paragraph (1) of Section 6(f). Upon review, we have concluded that simply deleting paragraph (4) of section 6(f) would have the desired effect. There can be no confusion that servicemembers who returned to civilian service prior to enactment are entitled to benefits through the date of their return as provided in paragraph (1). This deletion would remove unnecessary and redundant language. The Board, as a general policy, takes no position on the broad Federal employee compensation, retirement policy, or budget issues raised by proposals to extend or enhance TSP benefits to particular groups. Such issues are beyond the purview of the Board, which is an independent agency and is not involved in the Administration's legislative clearance process. Our statutory role is rather one of administering the TSP for the exclusive interest of its participants and beneficiaries. From that perspective, we believe the provisions of S. 843, and its counterpart in the House, H.R. 995, provide the necessary statutory authorization and permit a reasonable administrative framework. We would be pleased to implement such a program upon enactment of the legislation.

STATEMENT OF THE LABOR POLICY ASSOCIATION

June 11, 1993

The Honorable John D. Rockefeller IV
Chairman
Senate Committee on Veterans' Affairs
414 Russell Senate Office Building
Washington, DC 20510-6375

Dear Chairman Rockefeller:

The Labor Policy Association appreciates the opportunity to comment on S. 843, the Uniformed Services Employment and Reemployment Rights Act of 1993. Labor Policy Association (LPA) is an organization of 195 major U.S. employers concerned exclusively with the development of labor-management and human resources policy at the federal level. LPA member companies are major employers of men and women who are serving, or who have served, in the U.S. military. Thus, the provisions of S. 843 will have an impact on the employment policies and practices of LPA's member companies.

We commend the Committee for considering this important issue. The experience of our members with the call-up of reservists during the Persian Gulf conflict showed that the myriad of existing legal provisions dealing with veterans' employment and reemployment rights and benefits, some of which have been on the books for over fifty years, were confusing both to employers and those employees called to military service.

We especially appreciate the intent of the Committee to clarify and make consistent the application of the law with respect to the rights of employees involved in military service, so that both the employees and employers will have a better understanding of what their respective obligations are under the law. We share the common goal of ensuring that employers do not discriminate against those in the uniformed services, and our comments below are offered in that spirit.

We have carefully reviewed S. 843 with two particular objectives in mind:

(1) to identify relevant issues which are not specifically addressed; and,

(2) to point out areas where even further clarification might be helpful.

Leave of Absence

Both the House and Senate bills provide that employees who leave employment for military service shall be deemed to be on furlough or leave of absence, and are entitled to the same rights and benefits as other employees on a furlough or leave of absence. We presume that the intent of this provision is to insure that employees on military leave are treated the same as other employees in a similar leave status. However, it is important to understand that many employers have different types of leave of absence policies and practices depending on the circumstances.

It is not uncommon for employers to have leave policies that regard employees on military leave the same as employees on other types of "unpaid" leaves of absence, such as personal, educational, long-term disability, or public service leaves. This is distinguished from employees in a "paid" leave status such as medical or sick leave, or vacation leave. Typically, employees in a paid leave status may continue participation in all employer sponsored benefit plans during the leave of absence. For employees on an unpaid leave, however, the employer's policy may not provide for continuation of benefits during such a leave, or it might allow continuation but require employee contributions for the premiums. Many employers do not continue benefits for employees on an extended (more than two weeks) military leave of absence.

In cases where the employer's existing policies and practices provide for more than one type of leave of absence, we recommend that section 4316(b) be further clarified to state that the employer will not be required to provide rights or benefits to individuals on military leave that are any greater than the rights or benefits provided to individuals in a similar leave status under the employer's existing leave of absence policies and practices.

The Honorable John D. Rockefeller IV
June 11, 1993
Page 3

Continuation of Insurance

Section 4316(b) allows employees on military leave to elect to continue their participation in employer sponsored health plans for the lesser of 18 months or the term of their military service. It is not clear if the term "health plan" used in this provision refers to medical insurance plans only, or applies as well to other types of health plans (e.g., dental, vision care, hearing, short or long term disability), or to life and accidental death insurance plans.

Another area under this same section that could be clarified involves the effect of this provision on an employee's COBRA rights. The employee's right to continue coverage and the employer's obligation to provide continued coverage for 18 months under this section appear to be analogous to the provisions of COBRA. Yet, the bill does not make clear whether separation from employment for military service is a "qualifying event" for purposes of COBRA. If it is not considered a qualifying event initially, does it become one after the employee has been on military leave for more than 18 months? Language in the bill clarifying the effect of this provision on COBRA will prevent confusion, and possible litigation, over the meaning of the law in the future.

Sections 4316(b)(2) and 4316(c)(1)(B) provide that an employee on military leave is not entitled to coverage under the employer's health plan to the extent that the individual is entitled to care or treatment from the Federal government by virtue of military service. Upon reemployment, section 4316(c)(2) provides that the employer may not impose any exclusions or waiting periods prior to reinstatement of health insurance coverage if such exclusion or waiting period would not have been imposed if the individual had been continuously employed. It seems, however, that if an individual is entitled to continuing care or treatment from the Federal government after discharge from the military for a service-connected condition, the employer should be able to exclude that condition from coverage under the employer health plan. Here, the provision in the House bill allowing such an exclusion should be adopted and included in S. 843.

In cases where employers offer multiple health insurance plans with specified "open enrollment" or "switch" options, we recommend that section 4316(c)(2) be amended to include a provision stating that the prohibition on imposing exclusions or waiting periods

prior to reinstatement of health insurance coverage applies only to reinstatement of the same health insurance plan and type of coverage the individual being reemployed was enrolled in prior to taking military leave.

There also is a need to clarify the obligations of employers concerning the types and levels of benefits to be provided to individuals upon reemployment. If the intent of the law is to restore individuals on military leave to the place they would have been if they had been continuously employed, what obligations do employers have, beyond not imposing exclusions or waiting periods for health insurance coverage, concerning reinstatement to benefit plans? Are employers also prohibited from imposing restrictions on reinstatement to other types of health plans (e.g., dental, vision care, hearing, short or long term disability), or to life and accidental death insurance plans? What types and levels of benefits are to be provided under these plans upon reemployment?

Coverage of Temporary Positions

Under current law, the entitlement to reemployment rights for veterans applies only to positions that are "other than temporary." As you know, the House bill, H.R. 995, specifically continues the exclusion for temporary positions, while S. 843 is silent on the issue. This is one instance where the Committee's clarification of the law would be most helpful. Whether the intent is to extend coverage of veterans reemployment rights to temporary positions or to maintain the exclusion under current law, that intent should be clearly stated in the language of the legislation rather than left for the courts to determine.

In our opinion, the distinction in coverage under current law between "permanent" and temporary positions is important and should be maintained. Today more than ever before, employers utilize workers on a temporary basis, as consultants and for specified limited time periods. This is necessary for companies to keep down overhead and labor costs, and remain competitive. A change in the law to provide coverage for temporary positions will only encourage the filing of claims for reemployment rights even where there was a clear understanding between the employee and employer that the position was only temporary in nature and there was no expectation of continued employment beyond a certain time.

Conditions of Reemployment

It is not uncommon for employers to require all persons returning from an extended leave of absence (usually more than 30 days), regardless of the reason for the leave, to meet certain conditions for reemployment. Typically, these conditions include passing a drug screen or receiving clearance from the company medical department. This issue is not addressed in either the House bill or S. 843. Thus, it is unclear whether such company practices and policies would be considered a violation of veterans' reemployment rights. We recommend that the bill be clarified to state that nothing therein affects the employer's right to treat returning veterans the same as any other employee returning to work from an extended leave of absence with respect to legitimate reemployment conditions.

Enforcement of Reemployment Rights: Statute of Limitations

Subchapter III of the bill provides for enforcement of veterans' reemployment rights through an administrative complaint process. However, neither the House or Senate bills contains a statute of limitations provision for the timely filing of such complaints. As is the case with other types of federal employment rights statutes (e.g., Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, and the Americans with Disabilities Act), we recommend that there should be a specified time limit for the filing of claims for violations of reemployment rights under the bill. The typical time-frame for the filing of a valid charge of discrimination under the aforementioned laws is 180 days.

A reasonable statute of limitations promotes certainty for employers, discourages non-meritorious claims, and encourages individuals who believe that their reemployment rights have been violated to exercise their rights in a timely manner.

Conclusion

We have attempted to identify practical issues that employers must deal with in carrying out their responsibilities and obligations under the veterans' reemployment rights law. Clarification of these points prior to enactment of a new law will avoid confusion, and prevent unnecessary complaints and litigation. If you should find it to be helpful, we would be most pleased to meet with you and other appropriate staff to discuss in more detail the issues we have raised.

We appreciate the opportunity you have given us to share our thoughts with respect to this very important legislation.

Sincerely yours,

Jeffrey C. McGuiness
President

STATEMENT OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

National Coordinating Committee for Multiemployer Plans

SUITE 603 • 815 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20006 • (202) 347-1461

May 25, 1993

VETERANS REEMPLOYMENT RIGHTS ACT

COMMENTS OF THE
NATIONAL COORDINATING COMMITTEE
FOR MULTIEMPLOYER PLANS ON
SENATE DISCUSSION DRAFT ARM93.077

This paper provides comments of the National Coordinating Committee for Multiemployer Plans[1] on Senate discussion draft ARM93.07, the Uniformed Services Employment and Reemployment Rights Act of 1993 ("Proposal").

Multiemployer plans are collectively bargained. Typically, tens or hundreds of employers contribute to a multiemployer plan to provide benefits for hundreds, thousands, or even tens of thousands of participants. These plans are essential to the physical, emotional, and financial well-being of approximately ten million blue collar American workers.

---

[1] The NCCMP is a nonprofit, tax-exempt organization established after Congress enacted ERISA in 1974. It consists of representatives of approximately 240 pension and welfare plans, or their sponsors. On behalf of its affiliated plans, and the approximately nine million participants and beneficiaries of multiemployer plans generally, the NCCMP is entirely engaged in monitoring the development -- legislative, administrative, and judicial -- of the laws relating to the structuring and administration of multiemployer pension and welfare plans.

1. Benefits Employers Must Provide to Former Employees Currently in Armed Service

Proposal Section 4316(b)(1) would, in general, require an employer to provide a former employee currently in armed service with rights and benefits equal to those relating to other employees on furlough or leave of absence. We recommend that an exception to this rule be provided for: (1) benefits provided on leaves that are mandated by federal, state or local law; (2) benefits provided pursuant to a collective bargaining agreement; and (3) benefits provided on leaves that last no longer than two weeks.

(1) Leaves That Are Mandated by Federal, State or Local Law

The rationale for Section 4316(b)(1) appears to be that, if the employer can afford a right or benefit for any employees on leave, employees who enter the armed services are deserving of at least equal rights and benefits. However, where a right or benefit is provided pursuant to a mandate of federal, state or local law, there is no indication that the employer can afford to provide such right or benefit. Unlike most rights and benefits, employers do not have the option of eliminating these for their entire work force. Further, there has been no determination of any federal, state or local government body that that particular right or benefit is necessary or appropriate to also be provided

on a mandated basis to former employees currently in armed service.

(2) Collectively Bargained Benefits

Benefits negotiated through collective bargaining are not manipulable by an employer. Further, collectively bargained employees give up other parts of their compensation package to receive a negotiated benefit. Finally, and perhaps most importantly, requiring an employer to bring the benefits of all other employees up to the level negotiated by collectively bargained employees would put severe pressure on the collective bargaining process. It would make it far more difficult for employee representatives to negotiate benefits, if the employer will have the added expense of providing such benefits to noncollectively bargained employees as well. Employers will have an incentive to resist union demands for paid leave, personal days, etc., even where the cost of those benefits is offset by wage concessions.

(3) Leaves of No More Than Two Weeks

There should also be an exception for leaves that last no longer than two weeks, such as bereavement leave, sick leave, personal days, etc. The primary reason for continuing pay and/or benefits during these periods is because it is simpler and less expensive than the administrative procedure that would be necessary to

remove these individuals from the rolls and then put them back on the rolls when they return from leave.

The short period involved makes even very generous benefits such as full pay inexpensive for employers to provide. It is not appropriate to require similar treatment of employees the duration of whose leave may be much longer.

2. Life and Disability Insurance.

Proposal Section 4316(b)(3) says that a person in the armed services is not entitled to coverage under a life insurance policy for a death incurred by the person as a result of his or her participation in, or assignment to an area of, armed conflict, to the extent that the coverage is excluded or limited by a provision of the policy. This exception to the mandated coverage requirement should be extended to deaths that occur in the course of training, or while in an area of armed conflict, even if not assigned there.

Further, a similar exception to the mandated benefits rules should be applied to disability coverage, either long or short-term, under a long-term disability plan or a pension plan, with respect to disabilities that occur as a result of the person's participation in, or assignment to an area of, armed conflict or in the course of training or while in an area of armed conflict, even if not assigned there.

3. Coordination with COBRA.

The Proposal should make clear that the health care continuation coverage requirements of Proposal Section 4316(c) do not apply to the extent the employer treats the reduction in hours of people who enter armed service as a COBRA event and gives them their COBRA rights. Indeed, COBRA may be preferable from the perspective of the employee entering armed service, because his or her family members will have independent election rights under COBRA. In addition, COBRA provides greater flexibility than the Proposal, because individuals can select either core-only or full coverage under COBRA.

4. Credit for Armed Service.

Proposal Section 4317(a)(2)(B) requires that each period served in the uniformed services, upon reemployment, be deemed to constitute service with the employer or employers maintaining a plan for purposes of determining the nonforfeitability of the person's accrued benefits and the accrual of benefits under the plan.

Legislative history should clarify that each week on duty in the armed services equals 40 hours of service (or, depending on the way the plan credits service, five days or one week) for this purpose. This will relieve

plans of the impossible burden of reconstructing actual working hours for armed services personnel.

5. Contributions to Multiemployer Health and Welfare Plans

Proposal Section 4317(b)(1) provides that an employer reemploying a person having pension benefits pursuant to the Proposal will be liable to fund any such pension obligation. In the case of a multiemployer plan, any such liability will be allocated by the plan in such manner as the sponsor maintaining the plan may provide, or, if the sponsor does not so provide, shall be allocated to the last employer employing the person before his or her period of armed service.

We urge you to provide a similar rule to fund health and welfare benefits (e.g., health, life or other benefits) required by the Proposal and paid through multiemployer health or welfare plans.

6. Plan Earnings and Salary Reduction During Armed Service

Proposal Section 4317(b)(4) states that, unless the plan provides otherwise, no earnings will be credited and no elective employer contributions or forfeitures allocated to an individual in armed service prior to the time he or she is reemployed and has contributions made on his or her behalf. This will relieve employers and plans of the impossible burden and the expense of retroactively crediting interest on

imaginary account balances, reconstructing imaginary elective contributions and reallocating forfeitures. We applaud the decision to include this provision.

7. No Adverse Tax or Other Consequences.

Proposal Section 4317(d)(1) says that the Proposal's benefits provisions will not apply to the extent they require any action to be taken that would cause the plan, participant or employer to "suffer adverse tax or other consequences" under the Internal Revenue Code of 1986. We suggest that legislative history make clear that "adverse tax or other consequences," includes actions that impose significant administrative burdens, even if there is no significant adverse financial impact. For example, the need to rerun the actual deferral percentage or actual contribution percentage tests or the nondiscriminatory benefits or coverage tests of Code section 401(a)(4) and 410(b) would be an adverse consequence, even if, after rerunning the tests, the plan still passed.

In addition, we suggest that the word "participant" in Proposal section 4317(d)(1) be replaced with the term "any of its participants." This would make more clear that an "adverse tax or other consequence" includes an adverse consequence to a participant who has not had armed service. Thus, it would include, for example, a refund of elective deferrals or employee contributions or a forfeiture of an employer match for highly compensated employees.

If you have any questions of if we can be of further assistance to you on these issues, please contact Vivian L. Hobbs of our professional staff at (202) 872-8610, Arnold & Porter, 1200 New Hampshire Avenue, N.W., Washington, DC 20036.

STATEMENT OF THE NON COMMISSIONED OFFICERS ASSOCIATION

Mr. Chairman, the Non Commissioned Officers Association sincerely appreciates this opportunity to share with the committee its views on the Uniformed Services Employment and Reemployment Rights Act of 1993. NCOA also appreciates and commends both the House and Senate Veterans Affairs Committees for their efforts in producing an equitable reemployment rights package for veterans. Both the House and Senate bills are excellent notwithstanding their differences. However those differences must be resolved before legislation can be passed and sent to the president. Accordingly, NCOA will focus its submission only on those portions of the bills which remain in disagreement.

Additionally, for the sake of brevity and expediency, NCOA will address those differences in the order provided in the committee summary. Therefore no order of importance assumptions should be drawn from the following.

Extra-Territorial Coverage

The Senate bill extends reemployment rights protection to overseas employees of American controlled companies. NCOA endorses the Senate provision.

Temporary Positions

The House bill excludes defined temporary positions from reemployment rights coverage. NCOA concurs in the House provision.

Documentation

The House bill would not allow denial of reemployment in the absence of documentation of qualifying service. The Senate bill is similar regarding reemployment. However, the Senate bill would allow employers to require veterans to present proper documentation of service to receive reinstated corporate pension benefits. The extra step in the Senate bill constitutes reasonable employer protection and is supported by NCOA.

Reemployment Positions

The House and Senate share fundamental agreement on the question of reemployment positions. At issue is the timing. The House would require reemployment in the same job after service of 90 days or less. The Senate would require same job reinstatement only after service of 30 days or less. Thereafter similar employment would be required. NCOA appreciates the intention of the House bill but also knows that it would be difficult for small employers, particularly, to assure same job reinstatement after a period longer than 30 days. Accordingly, NCOA endorses the Senate provisions.

Reemployment by the Federal Government

Once again, similar provisions exist in the House and Senate bills. However, the Senate provisions appear slightly more forceful in their application. Therefore, NCOA endorses the Senate provisions in this area.

Rights and Benefits Under Practice or Agreement Related to Others on Furlough or leave of Absence.

Such benefits would be assured under the House bill but would be limited under the Senate bill. The limits placed by the Senate bill would exempt or reduce employer liability to provide medical and life insurance benefits except to the extent that they exceed the benefits accrued during military service. It would also limit employer liability to provide such benefits to a period not to exceed 18 months. The limitations placed by the Senate are reasonable and endorsed by the association.

Rights and Benefits Provided by Statute when there is no Practice or Agreement in Effect.

Cost to employee

The House bill provides that the service member may be required to pay the entire cost of any benefit continued while the Senate more narrowly says the member may be required to pay 102 percent of the full premium for health plan coverage. NCOA endorses the broader language of the House bill. The use of the word entire could reasonably be interpreted as to allow employers to recover the administrative costs of the program. Additionally, by removing the specific reference to health plan coverage, service members may be allowed to participate in other employer provided programs.

Period of Continued Coverage

The House bill would allow service members to continue enrollment in employer sponsored insurance programs for up to 18 months. The Senate bill would allow coverage for 18 months or the period of service, whichever is less. Since the service member is paying the premium, NCOA urges Congress to allow continued enrollment for the full period of enlistment.

Exclusion or Waiting Period for Health Benefits

The provisions herein are designed to protect returning service members from pre-existing condition exclusions in civilian insurance while exempting employers from assuming financial responsibility for service connected injuries or illnesses. NCOA believes the Senate bill accomplishes this goal with greater precision.

Period of Protection from Discharge upon Reemployment

The House and Senate bills agree on protection for all except those who serve for 31 days or less. The House bill would provide protection equal to the length of service while the Senate would continue the current practice of allowing no protection. NCOA endorses the House provision.

Use of Civilian Leave

Again the House and Senate are in agreement on allowing service members to use accrued leave to offset absence for military service. The House would except temporary employees while the Senate does not. Additionally the Senate would require the individual to request leave and would limit such leave to that accrued prior to entry into service. NCOA concurs with the Senate provisions but would except temporary employees as proposed by the House.

Multi-employer Pension Plan Benefits

The House bill allows the sponsor of a Multi-employer Pension Plan to assign liability for service members. The Senate bill would assign liability to the last employer of the service member if the plan sponsor fails to assign liability. NCOA concurs with the Senate provision.

Pension Benefit Plan Contributions

Perhaps the most contentious parts of this legislation are the following provisions relating to employer sponsored pension benefits. At issue is fairness to the service member balanced against the financial ability and responsibility of the employer to subsidize military service. Essentially, the program is legislated patriotism. **In all candor, NCOA would resolve this issue by requiring federal reimbursement of employer contributions for the period of qualifying service provided by the veteran. For service members not covered by civilian retirement plans, NCOA would require vesting at a rate currently defined in the Voluntary Separation Incentive formula contained in Title 10. Such action would place all veterans of short term service on equal footing upon discharge. Additionally it would eliminate employer underwriting of military service.** Since Congress is unlikely to take this approach, NCOA reluctantly makes the following choices:

Limitation of Contribution Amount

NCOA supports the Senate provision limiting payments of both the service member and employer to that amount which would have been permitted or required if the service member had remained continuously employed.

Elements of Employer Contribution

The association supports a combination of Senate and House bill provisions that allow service members to continue to share in voluntary employer contributions and allocation of forfeitures to the same extent that such distributions accrue to other employees during the period of military service. The association would also require employer contributions be made concurrently with any periodic on retroactive contributions to the plan made by the service member.

Period for Making Retroactive Contributions

Again the House and Senate bills agree except that the Senate bill would require the retroactive payment period shall not be shorter than the period of service for which payments are due. NCOA concurs with the Senate provision.

Computation of Liability and Contributions

The House bill would base payments on the rate of compensation the service member received immediately before service while the Senate would require payments based on the amount the service member would have received but for military absence. Rather than endorsing either provision, NCOA would allow the service member to choose the rate of continued participation.

Pension Benefit Protection

NCOA endorses the Senate provisions of the bill that would provide protection to the pension plan and employer against provisions of the Veterans Reemployment Rights Act that may result in tax consequences.

Enforcement of Rights

Both the House and Senate bills require various actions on the part of the Secretary of Labor to obtain voluntary compliance with the law and both provide for referral to the Attorney General if unsuccessful. Neither requires action on the part of the Attorney General to force compliance. NCOA believes the Attorney General should be required to act on behalf of the veteran in an effort to gain compliance.

Venue

NCOA concurs with vesting jurisdiction in all cases in the appropriate Federal District Court. The remaining provisions in disagreement between the House and Senate bills not addressed above are of little consequence to the association.

Conclusion

Mr. Chairman, it has been 53 years since the first Veterans Reemployment Rights act extended job protection to individuals who serve in the armed forces. A lot has changed in those 53 years. Most notable, society has become more mobile both at home and at work. People no longer are born and die in the same house or even the same town or state. More importantly, workers no longer work for the same corporation for a lifetime. In fact most workers will have five or more jobs before age 30 and will change employment three times or more after age 30. As a result, portable pension plans have been developed and are growing significantly while single employer "defined benefit" plans have declined almost 25 percent.

The bills under consideration by the committee continue a practice that has become custom and tradition over the past 53 years. It requires the employer of a veteran to support that individual through military service. Altogether, such patriotic support was not hard to justify for a career employee many years ago. However that same patriotic support in today's portable pension and job market places a tremendous financial burden on employers. As an association, our primary concern is to protect the veteran so NCOA will support the passage of a law that continues the custom and tradition of employer sponsored benefits. Yet, NCOA firmly believes these pension costs should be transferred to government.

NCOA again extends to the Committee its appreciation for the opportunity to comment on the Uniformed Services Employment and Reemployment Rights Act of 1993.

STATEMENT OF THE OFFICE OF PERSONNEL MANAGEMENT

STATEMENT FOR THE RECORD OF
HONORABLE JAMES B. KING
DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

for a hearing of the

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

on

PROPOSALS TO REFORM THE VETERANS'
REEMPLOYMENT RIGHTS LAW

MAY 13, 1993

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR PERMITTING THE OFFICE OF PERSONNEL MANAGEMENT TO EXPRESS OUR VIEWS ON S. 843, A BILL ENTITLED THE "UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1993," WHICH YOU, MR. CHAIRMAN, INTRODUCED ON APRIL 29TH. WE ARE ALSO ADDRESSING A COMPANION BILL, H.R. 995, AS PASSED BY THE HOUSE ON MAY 4TH.

S. 843 AND H.R. 995 WOULD COMPLETELY REVISE AND RESTRUCTURE THE VETERANS' REEMPLOYMENT RIGHTS (VRR) LAW, WHICH HAS, SINCE 1940, PROTECTED JOB RIGHTS DURING A CIVILIAN'S ABSENCE TO PERFORM ACTIVE MILITARY DUTY OR MILITARY TRAINING. OVER THE YEARS, LEGISLATIVE AMENDMENTS AND NUMEROUS JUDICIAL INTERPRETATIONS, TOGETHER WITH CHANGING MILITARY REQUIREMENTS AND THE EVER-INCREASING COMPLEXITY OF MODERN EMPLOYMENT BENEFITS, HAVE COMBINED TO RENDER EXISTING VRR LAW MORE DIFFICULT AND CUMBERSOME TO ADMINISTER AND INCREASINGLY UNCLEAR TO BOTH EMPLOYERS AND INDIVIDUALS. THE COMPREHENSIVE REFORM UNDER THESE BILLS WOULD ESTABLISH UNIFORM DEFINITIONS OF RIGHTS AND BENEFITS, SIMPLIFY DETERMINATION OF ELIGIBILITY AND

ENTITLEMENT, AND CLARIFY AND IMPROVE PROCEDURES FOR ENSURING TIMELY COMPLIANCE WITH THIS LAW.

OPM STRONGLY SUPPORTS THIS EFFORT TO CLARIFY, SIMPLIFY, AND STRENGTHEN EMPLOYMENT PROTECTIONS FOR ALL VETERANS, AND PARTICULARLY RESERVISTS. TODAY'S U.S. MILITARY STRATEGY ASSIGNS A MAJOR ROLE IN OUR NATIONAL MILITARY PREPAREDNESS TO RESERVE COMPONENTS. THESE RESERVISTS MUST BE READY TO INTERRUPT THEIR PRIVATE LIVES AT ANY TIME, AND THIS READINESS IS HEAVILY DEPENDENT UPON CLEAR ASSURANCES ABOUT EMPLOYMENT PROTECTIONS AND GOOD COOPERATION AND SUPPORT FROM CIVILIAN EMPLOYERS.

WE AT OPM PARTICULARLY ENDORSE THE PROVISION IN BOTH THE HOUSE AND SENATE BILLS AFFIRMING THE FEDERAL GOVERNMENT'S RESPONSIBILITY TO SERVE AS A MODEL EMPLOYER WITH RESPECT TO VETERANS' EMPLOYMENT RIGHTS. THE FEDERAL GOVERNMENT, AS AN EMPLOYER, HAS A LONG-STANDING TRADITION OF SUPPORT AND ENCOURAGEMENT FOR EMPLOYEES WHO ARE ABSENT FOR MILITARY DUTY, AND WE HAVE LONG OFFERED SUCH INDIVIDUALS CONSIDERABLY GREATER BENEFITS THAN MANY EMPLOYERS.

WHILE WE DEFER IN GENERAL TO THE DEPARTMENT OF LABOR ON THE TWO BILLS BEFORE THE COMMITTEE, I WOULD LIKE TO COMMENT BRIEFLY ON TWO CONCERNS OPM HAS WITH THESE BILLS.

FIRST, THE BILLS WOULD EXPAND OPM'S CURRENT OBLIGATION TO FIND ALTERNATIVE FEDERAL EMPLOYMENT FOR CERTAIN EMPLOYEES WHO CANNOT BE

REEMPLOYED IN THE POSITION OCCUPIED IMMEDIATELY BEFORE MILITARY DUTY. CURRENT LAW IMPOSES SUCH A REQUIREMENT IN CASES OF VETERANS UNABLE TO RETURN TO THEIR POSITIONS IN THE LEGISLATIVE BRANCH. BOTH BILLS WOULD EXPAND THIS OPM RESPONSIBILITY TO INCLUDE JUDICIAL BRANCH EMPLOYEES. H.R. 995 WOULD ALSO REQUIRE OPM TO FIND ALTERNATIVE EMPLOYMENT FOR FORMER NATIONAL GUARD TECHNICIANS ELIGIBLE FOR TRANSFER TO THE COMPETITIVE CIVIL SERVICE, WHILE S. 843 WOULD INCLUDE TECHNICIANS WITHOUT REGARD TO COMPETITIVE STATUS, AND WOULD ALSO EXTEND THIS OPM RESPONSIBILITY TO INCLUDE EMPLOYEES NOT REEMPLOYED BY INTELLIGENCE AGENCIES. SINCE OPM HAS LITTLE POWER OTHER THAN PERSUASION TO ENCOURAGE AGENCIES TO OFFER EMPLOYMENT TO THESE DISPLACED INDIVIDUALS, WE ARE VERY CONCERNED ABOUT OUR ABILITY TO ENSURE PLACEMENT OF AN UNDEFINED NUMBER OF INDIVIDUALS, REGARDLESS OF WHETHER VACANT POSITIONS EXIST. THIS WOULD BE OF PARTICULAR CONCERN IF THERE IS EVIDENCE THAT THE INDIVIDUALS WERE NOT REEMPLOYED BY THE NATIONAL GUARD OR THE INTELLIGENCE COMMUNITY BECAUSE THEY DID NOT MEET THE NORMAL SUITABILITY STANDARDS FOR FEDERAL EMPLOYMENT.

WE ALSO NOTE THAT THERE ARE A NUMBER OF INCONSISTENCIES BETWEEN PROPOSED PROVISIONS OF THE VRR LAW IN TITLE 38 AND THE CURRENT FEDERAL EMPLOYEE BENEFIT LAWS IN TITLE 5. WITH FEW EXCEPTIONS, THE PENDING BILLS GIVE NO RECOGNITION TO THIS. WE FEEL THAT IT IS ESSENTIAL TO CONFORM TITLE 5 TO THE NEW BENEFIT REQUIREMENTS UNDER TITLE 38 TO AVOID AMBIGUITY AND DISPUTES. WE WOULD WELCOME THE OPPORTUNITY TO WORK WITH THE COMMITTEE TO REVISE FEDERAL PERSONNEL LAWS AS NECESSARY TO CONFORM WITH THE NEW VRR REQUIREMENTS UNDER EITHER H.R. 995 OR S. 843.

THANK YOU. WE WOULD BE PLEASED TO PROVIDE ANY ADDITIONAL INFORMATION THE COMMITTEE MAY NEED.

STATEMENT OF THE DEPARTMENT OF JUSTICE

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D C 20530

02 JUL 1993

Honorable John D. Rockefeller IV
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We appreciate this opportunity to set forth the views of the Department of Justice on two bills, S. 843, the "Uniformed Services Employment and Reemployment Rights Act of 1993," and H.R. 995, of the same name. We generally support this legislation, but we have several concerns about litigation arising under the bills as drafted.

I. Administrative Subpoena Authority.

Section 2 of S. 843 (proposed 38 U.S.C. § 4325)[1] authorizes the Department of Labor (DOL) to issue administrative subpoenas not only to state and private employers, but also to federal employers,[2] and to compel the attendance and testimony of witnesses and the production of documents relating to any Veterans Reemployment Rights (VRR) investigation. Section 4325(c) authorizes the district courts, upon application of the Attorney General (made at the request of DOL), to enforce DOL subpoenas and to punish any failure to obey them as contempt of court.

We have a serious concern about this provision. In theory, under this provision, if a federal Executive Branch agency refused to comply with a DOL subpoena, DOL, represented by the

---

[1] For the sake of simplicity, all sectional citations in this letter will be to the proposed provisions of title 38, U.S. Code.

[2] Section 4303(4)(A) defines "employer" to include the Federal Government and section 4303(6) defines "Federal Government" to include "any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States."

Attorney General, could sue the agency in district court to enforce the subpoena. In reality, however, neither DOL nor this Department would pursue such a course of action.

It has long been established that lawsuits between two federal agencies are not generally justiciable. The federal courts may adjudicate only actual cases and controversies. Muskrat v. United States, 219 U.S. 346 (1911). A lawsuit involving the same person as plaintiff and defendant does not constitute an actual controversy. Lord v. Veazie, 49 U.S. (8 How.) 251 (1850); Cleveland v. Chamberlain, 66 U.S. (1 Black) 419 (1862). This principle applies to lawsuits between members of the Executive Branch. United States v. Shell Oil Co., 605 F. Supp. 1064, 1082 (D. Colo. 1985); United States v. Easement and Right of Way, 204 F. Supp. 837, 839 (E.D. Tenn. 1962); Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311, 312-313 (2d Cir.), cert. denied, 326 U.S. 746 (1945). Thus, a lawsuit between two components of the unitary Executive Branch does not present a justiciable "case or controversy" and is outside the judicial power of the federal courts. See United States v. ICC, 337 U.S. 426, 430 (1949). See also Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force, 13 Op. O.L.C. 157, 166-69 (1989) (preliminary print); Proposed Tax Assessment Against the United States Postal Service, 1 Op. O.L.C. 79 (1977).[3]

In any case, in most situations where DOL, on behalf of a federal employee, requests documents from an Executive Branch agency, they will be supplied without incident. Any legal dispute that arose would be resolved by the Attorney General or the President.

We respectfully urge that section 4325 of S. 843 be revised and narrowed to apply only to state and private employers and not to the Federal Government. Section 4323(b) of H.R. 995 authorizes DOL to issue administrative subpoenas to state and private employers to compel the attendance and testimony of witnesses and the production of documents relating to any VRR investigation. Section 4323(c) authorizes the district courts to punish any failure to obey such subpoenas as a contempt of court.[4] We urge the adoption of these provisions.

---

[3] But see, e.g., United States v. Nixon, 418 U.S. 683 (1974); United States v. ICC, 337 U.S. 426 (1949); Dean v. Herrington, 668 F. Supp. 646 (E.D. Tenn. 1987); Tennessee Valley Authority v. United States, 13 Cl. Ct. 692 (1987).

[4] Section 4322(a)(2) of H.R. 995 provides that sections 4323(b) and (c) do not apply where the employer is the Federal Government.

II. Litigation Authority.

Section 4323(a) of S. 843 provides for the Office of Special Counsel (OSC) to represent federal Executive Branch employees before the Merit Systems Protection Board (MSPB), and section 4323(e) provides for OSC representation of such employees in the federal courts in appeals from final decisions of the MSPB. Under section 4323, Executive Branch employees would also have the option of retaining private counsel to represent them before the MSPB or of proceeding pro se.

We have serious concerns about the OSC representation authorized by section 4323(e). This representation could create the constitutionally troubling impression that the Executive Branch was taking inconsistent positions before an Article III tribunal. There is no comparable provision in the law providing for OSC representation of federal employees in any other type of case. While the OSC has authority, under 5 U.S.C. § 1212, to prosecute actions before the MSPB against federal agencies and federal employees engaging in prohibited personnel practices, those actions are brought in the name of the OSC, not in the name of the aggrieved employee. OSC cannot appeal to the federal courts from an adverse Board decision in such cases. Although the aggrieved employee may seek judicial review of the MSPB's decision, he must do so pro se or retain private counsel.

Section 4322(c)(2) of H.R. 995, by contrast, provides for OSC to represent federal employees before the MSPB, but not before the federal courts in appeals from final decisions of the MSPB. Thus, we believe that section 4322(c)(2) of the House bill is preferable.

Section 4322(a)(1) of S. 843 provides for the Attorney General[5] to represent state and private-sector employees in actions in the federal courts to enforce the Act. This section provides that the Attorney General "may appear on behalf of, and act as attorney for," the claimant if the Attorney General is "reasonably satisfied" that the person seeking representation is entitled to the rights or benefits sought. Department of Justice representation may be sought only where the aggrieved employee has first sought assistance from DOL and DOL has been unable to obtain the employer's voluntary compliance with the law. Under section 4322(a)(2), aggrieved employees are not required to seek DOL's assistance or Department of Justice representation; they have the option of retaining private counsel to bring a district

---

[5] Section 4303(1) of S. 843 defines "Attorney General" to include "any person designated by the Attorney General to carry out a responsibility of the Attorney General under this chapter." This provision is unnecessary in light of 28 U.S.C. §§ 509 and 510, and could be deleted.

court action on their behalf or of proceeding pro se. We fully support this provision. Section 4322(c)(1) of H.R. 995 includes an almost identical provision for representation of state and private employees by the Attorney General.

III. Attorneys Fees and Litigation Expenses.

Section 4322(c)(2)(B) and section 4323(c)(4) of S. 843 authorize the district courts and the MSPB, respectively, to award attorney fees, expert witness fees, and other litigation expenses to prevailing VRR claimants represented by private counsel. We question whether an attorney fee provision is necessary, because Department of Justice representation would be available under the bill (at no cost) to persons with meritorious cases. Aggrieved employees may choose to retain private counsel and institute lawsuits or MSPB actions rather than seek the assistance of the DOL, which has historically had a high rate of success in resolving VRR disputes amicably and in obtaining voluntary compliance with the law. Accordingly, we recommend that this provision be deleted.

Section 4322(d)(3)(B) of H.R. 995 authorizes the district courts to award attorney fees, expert witness fees, and other litigation expenses to a prevailing state or private employee represented by private counsel. For the same reasons, we recommend that this provision be deleted.

IV. Liquidated Damages.

Section 4322(c)(1)(A)(iii) of S. 843 provides that the district courts may require a state or private employer to pay a prevailing VRR claimant "liquidated damages" (in addition to compensating the claimant for any loss of wages or benefits suffered by reason of the employer's failure to comply with the law) in an amount equal to that found due the employee for lost wages and benefits, if the court determines that such employer's failure to comply with the law was "willful." Section 4322(d)(2)(A)(iii) of H.R. 995 is to the same effect. This provision would substantially change existing VRR law, under which relief is limited to reinstatement and compensation for lost wages and benefits. The VRR law has never provided for liquidated or punitive damages. We are concerned that this punitive liquidated damages provision would make it more difficult for the DOL to resolve VRR disputes amicably, and would consequently increase litigation.

V. Reporting Requirements.

Section 4332 of H.R. 995 requires the Secretary of Labor, after consultation with the Attorney General and the Special Counsel, to report annually to Congress, commencing on February 1, 1995, on enumerated matters occurring during the preceding

fiscal year, including: (1) the number of cases referred to the Department of Justice; (2) the number of district court complaints filed by the Department; and (3) the nature and status of each case referred to the Department or filed in district court. In our view, this reporting requirement may impose an unnecessary burden on the Department of Justice, insofar as it requires a report to Congress on the nature and status of each case referred to, or filed in court by, the Department during the preceding year.

We appreciate this opportunity to advise the Committee of our views on this legislation. We would be pleased to work with Committee staff to address our concerns and others that may arise in the legislative process. Please do not hesitate to contact me if we can provide additional assistance.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Sheila Anthony

Sheila F. Anthony
Assistant Attorney General

STATEMENT OF THE DEPARTMENT OF THE TREASURY, SAMUEL Y. SESSIONS, DEPUTY ASSISTANT SECRETARY, TAX POLICY

Mr. Chairman and Members of the Committee: I am pleased to present the views of the Administration on S. 843, the Uniformed Services Employment and Reemployment Rights Act of 1993. As requested in your letter of invitation, I also have included our assessment of the differences between S. 843 and H.R. 995, which bears the same title. The Administration has previously expressed its support of veterans' reemployment rights and, in particular, has stated its support of H.R. 995. There are, however, certain technical and other coordinating amendments that are needed in order to ensure the administrability of the provisions and to avoid conflicts with Internal Revenue Code requirements.

In particular, our comments focus on issues related to tax-qualified retirement plans and deferred compensation. The Internal Revenue Code requires that these plans comply with specific limits on the amount of benefits and contributions that may be provided for employees on a tax-preferred basis. The favorable tax treatment afforded these plans is contingent upon satisfaction of these requirements at all times. Therefore, it is important that it be clear to employers, employees, and the Internal Revenue Service what types of benefits and contributions are required to be provided to reemployed veterans. Our comments below list several issues on which we have concerns or believe that clarifications are needed.

Coordination with Internal Revenue Code requirements

Both S. 843 and H.R. 995 require that employers make certain contributions and provide benefits under tax-qualified retirement plans for periods of qualified military service of reemployed veterans. Under these provisions, reemployed veterans may receive benefits that are not given to employees who are on other types of leaves of absence or furloughs. These benefits may accrue upon a veteran's reemployment rather than over the years of qualified military service to which they relate.

Without technical amendments, an employer's compliance with the provisions in both S. 843 and H.R. 995 could cause the employer's retirement plan to fail to satisfy certain tax-qualification rules under the Internal Revenue Code. For example, both S. 843 and H.R. 995 would require that, upon return to the employer, a reemployed veteran be allowed to make up elective contributions (i.e., salary reduction contributions) for the period in which he or she was in qualified military service. However, a reemployed veteran who elected to make two or more years' worth of elective contributions in a single year would likely cause the plan to exceed the annual limits for elective contributions ($8,994 for 1993). Similar situations could arise with regard to plans governed by section 457 (deferred compensation plans of tax-exempt and governmental employers), section 403(b) (tax-deferred annuities for teachers and employees of charitable organizations), and section 408 (simplified employee pension plans). In

addition, section 404 includes certain limits on contributions that are used to calculate the employer's federal income tax deduction, and contributions in excess of these limits trigger an excise tax for the employer.

The Treasury Department believes that technical amendments are needed under both S. 843 and H.R. 995 that coordinate an employer's retirement plan obligations to reemployed veterans with the tax-qualification requirements and other Internal Revenue Code limits. In particular, we believe that both S. 843 and H.R. 995 should contain language ensuring that contributions or benefits required to be provided to reemployed veterans do not cause the employer's plan to fail to meet the requirements of section 401(a) of the Code (and other applicable provisions) and do not cause the employer to be liable for any excise taxes that would otherwise arise for contributions made to the plan.

We note that S. 843 contains language providing that no provision of the bill would require any action that would cause "adverse tax consequences" to the plan, the participants, or the employer. However, more specific language is needed to avoid uncertainty in interpretation. We would suggest clarifying language that is similar to the language included in the technical corrections provisions of H.R. 17. The language in H.R. 17 provides that any contribution that is required for purposes of satisfying a veteran's reemployment rights does not cause a plan to fail the applicable Internal Revenue Code limits.

Defined contribution plans

The provisions of both S. 843 and H.R. 995 clarify current case law, which requires that periods of qualified military service be taken into account in determining a reemployed veteran's pension in a defined benefit plan (see *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977)). However, both S. 843 and H.R. 995 also require that employers make certain contributions to defined contribution plans for reemployed veterans. The provisions with respect to defined contribution plans raise a number of issues that need to be clarified.

The language in S. 843 requires that a reemployed veteran be given the opportunity make after-tax contributions and elective contributions for periods of qualified military service. In addition, if the reemployed veteran makes elective or after-tax contributions for these periods, he or she must be allocated any matching contributions that would otherwise be made for the elective or after-tax contributions. In addition, S. 843 provides that no other "elective employer contributions" are required to be made for periods of qualified military service. We interpret this language as not requiring the employer to make any other employer contributions to a defined contribution plan, other than providing the reemployed veteran with the opportunity to make elective and after-tax contributions and making any related matching contributions.

In contrast, H.R. 995 requires that, in addition to elective, after-tax, and matching contributions, an employer must allocate to reemployed veterans any "voluntary" contributions that were made during the period of qualified military service and any contributions that were not contingent upon compensation or the number of plan participants. Although these provisions are intended to expand the types of contributions that must be made for reemployed veterans, the parameters of the employer's obligation are not clear. In general, almost all contributions to defined contribution plans can be viewed as "voluntary" because the employer typically retains the discretion to make or not make the contribution. In addition, the employer's obligation to make or not make a contribution often is made contingent upon the employee's compensation, the company's profits, or an employee's employment on the last day of the plan year, for example. It is unclear whether H.R. 995 would require an employer to make contributions to a reemployed veteran where contributions were subject to any contingencies.

It is also unclear what type of contributions are contemplated by the provision in H.R. 995 that requires reemployed veterans to receive any contributions that were not based on compensation or the number of plan participants. Typically, an employer allocates its contribution to the plan on the basis of a percentage of employees' compensation or on a *per capita* basis, which takes into account the number of employees participating in the plan.

In addition to these definitional questions, our third concern with these provisions in H.R. 995 is the requirement that employers make additional contributions to make up for a reemployed veteran's lost earnings and allocations of forfeitures that otherwise would have accrued during a period of qualified military service. A requirement that reemployed veterans be "made whole" for lost earnings and forfeitures could significantly increase the costs of maintaining a tax-qualified plan. Because earnings on contributions are based upon the gains and losses of the assets in which the plan's funds are invested, there would be no other mechanism for an employer to make up lost earnings other than to make additional contributions on behalf of reemployed veterans. We view such a requirement as overly burdensome to employers who sponsor tax-qualified plans and, because of the potential liability, could result in employers' decisions to terminate existing plans or refrain from sponsoring new retirement plans. In addition, such a requirement would raise numerous administrative and recordkeeping issues with regard to the calculation of the proper earnings amounts, particularly in cases where employees have the ability to direct the investment of plan assets attributable to their account balance.

With regard to the make up of earnings, we note that S. 843 contains provisions specifically stating that such contributions are not required. Accordingly, we would support an amendment to H.R. 995 consistent with these provisions.

83-460 O - 94 - 6

OTHER TECHNICAL CORRECTIONS

In addition to the items discussed above, we would suggest a number of other technical changes to both S. 843 and H.R. 995 to ensure proper coordination with the Internal Revenue Code. In particular, we would suggest certain technical changes to the provisions in both bills concerning continuation health care coverage. We would be pleased to work with your staff on these items as well as the other issues discussed above.

STATEMENT OF THE U.S. MERIT SYSTEMS PROTECTION BOARD

Mr. Chairman and Members of the Committee: We are pleased to respond to your request for the views of the U.S. Merit Systems Protection Board on S. 843 and H.R. 995, the Uniformed Services Employment and Reemployment Rights Act of 1993. The Board supports the effort to clarify the employment and reemployment rights of veterans and other members of the uniformed services.

The Board was established by the Civil Service Reform Act of 1978 as an independent, quasi-judicial agency with responsibility to adjudicate appeals from personnel actions taken by the Federal Government. Among the cases the Board decides are those involving reemployment of Federal civilian employees following call up to military duty. In those instances where an employee contests an agency action, the Board serves as an independent forum to decide the dispute.

In over 10 years of adjudicating restoration actions involving the return of Federal employees to the job after military service, the Board has issued only a handful of decisions. This suggests that Federal agencies restore most employees to their former positions voluntarily, resolving most reemployment issues amicably. At the same time, the Board believes that the availability of an enforcement mechanism serves to foster such resolutions.

As the agency that would adjudicate the merits of any appeals that might arise under either S. 843 or H.R. 995, the Board will not comment on the substantive provisions of the legislation, except to note where the legislation would change existing law. For the most part, we will focus on the provisions establishing procedures for Federal employees to obtain review of agency restoration actions.

Both S. 843 and H.R. 995 would give the Board statutory authority to decide disputes between a returning employee and the employing agency. Currently, the Board decides such cases pursuant to regulations issued by the Office of Personnel Management. 5 C.F.R. 353.401(a).

From the Board's perspective as an adjudicative agency, the primary changes that S. 843 and H.R. 995 would make in the enforcement mechanisms available to Federal employees challenging agency restoration actions lie in the authority of the Secretary of Labor to investigate claims of Federal employees and the Special

Counsel to represent claimants before the Board. Those changes do not, however, establish a new role for the Board. The Board's fundamental role would still be to act as adjudicator, just as it now serves in deciding restoration to duty cases and as it generally serves in appeals of agency personnel actions. Moreover, under both S. 843 and H.R. 995, an individual would retain the current right to appeal to the Board individually, without using either the services of the Secretary of Labor or the Special Counsel.

Nor would the authority of the Board under S. 843 and H.R. 995 to decide cases brought by the Special Counsel be entirely novel. The Board presently has jurisdiction over certain actions—for example, Hatch Act cases—that the Special Counsel prosecutes before the Board. In such cases, the Board acts as a specialized civil service tribunal. Under either bill, the relationship of the Special Counsel to the Board would be like it is in other cases—essentially that of a prosecutor to a judge.

Both H.R. 995 and S. 843 would make the U.S. Court of Appeals for the Federal Circuit the reviewing court for Board decisions in restoration cases. This too is consistent with the present structure for judicial review of decisions in appeals to the Board. We believe that Federal Circuit review of most Board decisions has fostered the development of a uniform body of civil service law.

H.R. 995 expressly forbids the Special Counsel to represent Federal employees in the United States Courts of Appeals or the Supreme Court. S. 843 would, however, permit the Special Counsel to represent a person seeking review of a Board decision in the Federal Circuit, unless the person had not been represented by the Special Counsel before the Board. Currently, there is no similar provision for the Special Counsel to represent Federal employees seeking review of a Board decision in a restoration appeal in an appellate court.

With regard to specific provisions of the legislation in the context of existing Board practice, we note:

Jurisdiction: The Board's jurisdiction under S. 843 and H.R. 995 would be quite different. S. 843, which would limit the right to bring appeals to the Board to employees in Federal executive agencies, is generally consistent with the Board's current jurisdiction over restoration to duty appeals, except with regard to National Guard civilian technicians. H.R. 995 would, however, allow an employee in the Federal Government—defined to include all three branches—to bring an appeal to the Board. The Board currently has no authority to hear appeals from Federal employees outside the Executive branch.

Both S. 843 and H.R. 995 would define the employer of National Guard civilian technicians as the adjutant general of the state in which the technician is employed. The Board currently takes jurisdiction over cases involving the restoration of National Guard civilian technicians to duty following call up for service. In *Kostan v. Arizona National Guard*, the Board held that National Guard technicians are considered civilian employees of the Departments of the Army or Air Force and have the same rights, except those rights

specifically denied under the National Guard Technicians Act, 32 U.S.C. 709. 50 M.S.P.R. 120 (1991).

Procedures: S. 843 provides more detailed procedures for triggering Board adjudication of a case than H.R. 995, but once the requirements are met, neither bill would impose significant changes in present Board case processing. In large part, both bills leave the detailed requirements for case processing to the Board. We believe that it is appropriate to leave such matters to the Board, particularly since both bills explicitly grant the Board authority to issue regulations implementing the changes under Title 38. We believe that it is useful to have this authority spelled out, and an explicit grant of regulatory authority to the Board in Title 38 may serve as a flag to potential appellants that they must check the requirements for filing an appeal with the Board.

Representation of Appellants: The two bills differ in an employee's right to representation before the Board in cases not brought by the Special Counsel. S. 843 would permit representation in accordance with the rules of the Board, which do not restrict representation to attorneys. H.R. 995 would limit representation to counsel of the person's choice.

Remedial Authority: To the extent that both bills would grant the Board general authority to order compliance with Chapter 43 and compensatory relief for an individual upon a finding of a violation of Chapter 43, they are consistent with the kind of relief authorized by Title 5. The Board's authorizing statute, 5 U.S.C. 1204(a)(2), grants it the power to order "any Federal agency *or employee*" to comply with a final Board order. S. 843 and H.R. 995 authorize the Board to enter an order only against the "agency" or the "Federal Government," respectively.

H.R. 995 also provides for actions before the Board against the Director of the Office of Personnel Management (OPM) in the case of the Director's failure to "cause" alternative employment to be offered to a former employee of any of the branches of the Federal Government where the employer no longer exists or it is impossible or unreasonable to reemploy the person. S. 843 would provide similar reemployment protection but would require OPM to "ensure" that the person is offered such an alternative position. The jurisdiction in H.R. 995 over complaints involving OPM's performance would be a new authority for the Board; there is currently no comparable right in restoration cases. The bill provides little guidance as to the standards the Board would use to decide such a case. Although S. 843 would not authorize appeal of the Director's actions to the Board, it would provide additional protections to employees without setting up a new enforcement mechanism.

Attorney Fees: S. 843 would authorize the Board to award attorney fees, expert witness fees, and other litigation expenses in appropriate cases. Other Board appellants are given similar protection in certain appeals. 5 U.S.C. 1221(g) and 5 U.S.C. 7701(g).

Again, thank you for the opportunity to present our views on this important revision of veterans' reemployment rights. We would be pleased to work with the Committee and the staff in addressing these or other matters.

STATEMENT OF THE U.S. OFFICE OF SPECIAL COUNSEL

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

May 12, 1993

The Honorable John D. Rockefeller, IV
Chairman
Senate Committee on Veterans' Affairs
414 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

You have requested that the Office of Special Counsel (OSC) provide the Committee with an assessment of H.R. 995, the "Uniform Services Employment and Reemployment Rights Act of 1993," and S. 843 of the same name. You specifically request our comments on the differences between the two bills. We are happy to accommodate your request and we look forward to working with you as the bill makes it way through the Committee process.

I. Basis for the Secretary of Labor to conclude that a violation has occurred

Section 4322(b) of the House bill and Section 4321(d) of the Senate bill both require the Secretary of Labor (Secretary) to investigate complaints of persons alleging that they have been denied employment or reemployment rights and benefits if the have temporarily left Federal employment for military duty. The House bill states that the Secretary may refer the matter for litigation "if the Secretary, after investigation *is reasonably satisfied* that the employer has failed to comply with the provisions of this chapter...." The Senate bill states that the complaint may be referred by the Secretary to the Special Counsel for litigation "if the Secretary *determines as a result of the investigation that the action alleged in such complaint occurred*...." Based on this language, the Senate provision appears to require the Secretary to have a greater degree of certainty that a violation has occurred. However, the precise meaning of the "reasonably satisfied" standard is unclear.

II. Referrals to the Special Counsel from the Secretary of Labor

Section 4322(c)(2)(A) of the House bill provides that if the Secretary determines that the employer has failed to comply with the provisions of this chapter and efforts to obtain voluntary compliance are unsuccessful, and if the claimant requests in writing that the claim be referred for litigation, the case shall be referred

to the Special Counsel for litigation before the Merit Systems Protection Board (MSPB). Similarly, section 4323(a)(1) of the Senate bill states if the Secretary notifies the complainant of an unsuccessful effort to resolve a complaint relating to a Federal executive agency, the complainant "may request that the Secretary refer the complaint for litigation" before the MSPB. That litigation would also be handled by the Special Counsel. The House bill requires that the claimant submit a written request, whereas the Senate provision does not require that the request be made in writing. It is noteworthy that, under section 4321(e) of the Senate bill, if the Secretary is unsuccessful in his efforts to obtain corrective action, he shall provide the complainant with written notice of the result of the investigation and the complainant's rights under section 4322 of the bill. The House bill does not contain a similar provision for reporting the Secretary's results or the complainant's rights.

III. Investigations by the Special Counsel

Both bills provide that "if the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred [by the Secretary] is entitled to the rights or benefits sought," the Special Counsel may appear on behalf of, and act as attorney for the complainant before the MSPB. H.R. 995, section 4322(c)(2)(A); S. 843, section 4323(a)(2)(A). Although both bills state that the Secretary shall investigate such allegations, they do not specifically direct the Special Counsel to investigate the complainant's allegations. Moreover, at present the Special Counsel's investigative authority is limited to those areas delineated in 5 U.S.C. §§ 1214 and 1216. It is unclear whether the Special Counsel would have the authority to investigate the denial of reemployment rights under these proposed bills because they do not specifically make the denial of reemployment a prohibited personnel practice that OSC has authority to investigate under Section 1214 and 1216.

Presumably, it would be unnecessary for the Special Counsel to investigate such a referred complaint because the Secretary would have completed an investigation into the same allegations. However, neither bill specifically requires the Secretary to report its investigative findings to the Special Counsel. Thus, it is unclear whether the Special Counsel would receive a report of the Secretary's findings regarding a particular complaint or whether the Special Counsel could conduct an independent investigation into a referred complaint.

IV. Basis for the Special Counsel to litigate

As noted, the Senate bill and House bill provide that the Special Counsel may represent an individual referred to the Special Counsel by the Secretary "if the Special Counsel is reasonably satisfied" that the person on whose behalf a complaint is referred is entitled to the rights or benefits sought." As with the standard applicable

to the Secretary of Labor under the House bill, the precise meaning of "reasonably satisfy" as it relates to the Special Counsel's determination is also unclear. Paradoxically, under the Senate bill, the degree of certainty of a violation required by the Special Counsel to litigate a case is lower than the degree of certainty required of the Secretary of Labor to refer that case to the Special Counsel.

V. Notification of the complainant by the Special Counsel

Section 4323(a)(2)(B) of the Senate bill requires the Special Counsel to notify the complainant if she determines not to initiate an action and represent the complainant before the MSPB. The House versions lacks a similar provision However, it may be presumed that the Special Counsel would notify the complaint of its decision whether or not it was statutorily required to do so and regardless of the substance of that decision.

VI. Election of procedures

The House and Senate bill both require complaints to be submitted to the Department of Labor before referral to the Special Counsel. Also both bills provide for referral to the Special Counsel by the Secretary. There does not appear to be a provision allowing a complainant to file a complaint directly with the Special Counsel. However, the bills allow a complainant to file an appeal directly with the MSPB if the employee has chosen not to apply to the Secretary for assistance regarding a complaint or has chosen not to be represented by the Special Counsel.

From the language of the bills, it appears that anytime after a complaint is referred to the Special Counsel (at the complainant's request), the complainant could decline the Special Counsel assistance or representation. For example, the Special Counsel could investigate a referred complaint, determine to proceed with the matter only to then have the complainant obtain private counsel and proceed on his own before the Board. Such an occurrence could result in an unnecessary use of time and funds by the Special Counsel. Also, if the Special Counsel were to notify the complainant in writing that she was reasonably satisfied that the complainant was entitled to rights and benefits sought (as well as the legal and evidentiary bases for that conclusion) and then the complainant declined the Special Counsel's representation and proceeded on his own, it is unclear whether the Special Counsel's notification would have any legal weight or might be used as an adjudication of any issue or matter the complainant had pending or planned to file under any administrative appeals procedure.

It is therefore, recommended that the pending legislation be changed to require that, when a complaint is referred to the Special Counsel from the Secretary, the

complainant elect either to proceed on his own before the MSPB or under the representation of the Special Counsel. Such a requirement would be analogous to the provisions of 5 U.S.C. § 7122 which in certain instances require an employee to proceed under either negotiated grievance procedures or the appellate procedures of 5 U.S.C. § 7701. A time limit similar to that for filing Individual Right of Action appeals under 5 U.S.C § 1214(a)(3)(B) could be utilized. For example, after a complainant is referred to the Special Counsel, if 120 days after the complaint has been referred the complaint has not been notified by the Special Counsel that it shall seek corrective action on his behalf, the complainant may then file with the MSPB.

VII. Attorneys' fees

In cases where the MSPB finds that a complainant has not been provided with employment and reemployment rights and benefits, Section 4323(c)(4) of the Senate bill provides, *inter alia*, that the MSPB may in its discretion award the complainant reasonable attorney fees, expert witness fees, and other litigation expenses. The House bill does not contain a provision for the payment of such fees. As a result, the House version could discourage individuals from filing appeals with the Board without the Special Counsel representation.

VIII. Appeals from MSPB decisions

Both bills provide complainants with appeal rights to the Court of Appeals for the Federal Circuit from an MSPB decision denying the complainant the relief sought. Section 4323(e) of the Senate bill provides that a person may be represented by the Special Counsel in an action for review of a final order or decision issued by the MSPB unless the person was not represented by the Special Counsel before the Board in the proceeding below. The provision would provide the Special Counsel with independent litigating authority in this limited area. The House bill does not contain a similar provision. It should be noted that in an appeal from a MSPB decision before the Federal Circuit, the agency will be represented by the U.S. Department of Justice. Therefore, under the Senate bill, the Federal government would be representing before the Federal circuit both the complaint (by OSC) and the Agency (by DOJ) against which the complaint was filed.

Sincerely,

Kathleen D. Koch

Kathleen Day Koch

STATEMENT OF VIETNAM VETERANS OF AMERICA

DISCUSSION

Mr. Chairman and members of the Committee, Vietnam Veterans of America (VVA), appreciates the opportunity to present its views on S. 843 and H.R. 995, the Senate and House versions of the "Uniformed Services Employment and Reemployment Rights Act of 1993." Many Vietnam veterans have been recalled to active duty in recent years, because the military that served in Vietnam was the youngest that this country ever deployed in wartime. More importantly, VVA has since its inception been committed to the principle of standing in support of ensuing generations of veterans.

This legislation is important to veterans, and to the economic vitality of the United States. Though we have been privileged to defend this nation, we do not believe that citizen-soldiers who serve in time of crisis should have to pay for that privilege through loss or diminution of their jobs. Both the positions themselves and the various benefits that are part of them must be safeguarded when the men and women of America's workforce are called to active duty.

You have generously invited us to submit our evaluation of the differences between the Senate and House versions of the Reemployment Rights Act. Our analysis proceeds from agreement with the sense of Congress as to the purposes of this legislation:

- To encourage noncareer service in the armed forces with minimal disadvantages to civilian employment.
- To minimize disruption to both citizen-soldiers and their employers and coworkers.
- To prohibit discrimination against those who serve.
- To have the Federal Government be a model employer in reemployment practices.

VVA's decision rule in choosing between these two bills on a provision-by-provision basis is to maximize employment safeguards. Within that context, we are also mindful of the need of employers and those workers whose employment is <u>not</u> interrupted to get on with business. No job can be held forever, either in the public or the private sector. Nor do we insist that employees make every dollar they would otherwise have made. We are quite willing to see these interests balanced, and the equation must include the nation's vital interests in both economic strength and national defense.

We would like to simply proceed down the list provided by the Committee that summarizes the differences between the two bills.

1. EXTRA-TERRITORIAL COVERAGE

VVA prefers the Senate version, extending coverage to American-controlled employers in foreign countries. There are already too many incentives for exporting American jobs without adding another that discriminates against citizen-soldiers.

2. TEMPORARY POSITIONS

VVA supports the Senate version, extending coverage to temporary positions. Against the background of unemployment and underemployment among veterans, temporary positions are important. They often serve as stepping stones to career change and upward mobility, and they would seem to be among the easiest positions to protect for those whose absence comes from active duty service.

3. DOCUMENTATION

VVA supports the House version, which does not place the burden of documentation upon the employee. Our members have far too much experience with military records to assume that 90 days is a realistic period in which the employee can be called upon to secure paperwork. Indeed, we would be pleased to see the final language place a requirement upon the Department of Defense to provide such documentation upon release from active duty, so that neither the employee nor the employer bears the burden of this task, which neither one is well equipped to perform.

4. REEMPLOYMENT POSITIONS

VVA supports the House version, proving first priority for reemployment within 90 days. Though the longer absence this would allow is somewhat more disruptive to employers than a 30 day period, three months is not very long either to safeguard a job or for the government to wrap up a crisis.

5. REEMPLOYMENT BY THE FEDERAL GOVERNMENT

a. Federal Executive Agency Employees: VVA prefers the Senate version, requiring that the Office of Personnel Management (OPM) ensure that a comparable position is offered. In the absence of such a requirement, OPM will be authorized to decide in an arbitrary manner which returning employees to return to like positions and which to demote for serving on active duty.

b. Federal/Legislative Employees and National Guard Technicians: VVA supports the Senate bill because of its two stronger safeguards. As with Federal Executive Agency employees, requiring that OPM ensure that a comparable position is offered prevents capriciousness and provides real job protection. Also, the House version's requirement of competitive service status serves no legitimate interest, exempting a variety of positions for no useful reason. VVA's position is that <u>all</u> jobs deserve reemployment protection, and we discourage loopholes for Congressional employees.

c. Federal Security Agencies: VVA supports the Senate bill regarding federal security agencies. To some extent, positions in such agencies are different from "normal" jobs because of the security component they entail. We are willing to recognize the special nature of these agencies, but we want the employee protected in the manner these sections provide. If people in these positions need to be barred from citizen-soldier roles because of their work, such a bar should be created. A call to active duty must not become a device for removing some employees and not others.

6. RIGHTS AND BENEFITS RELATED TO FURLOUGH/LEAVE OF ABSENCE

VVA supports the Senate bill's limitations. These limit coverage for health care or death benefits to what is not provided elsewhere as the result of active service. Our interest in safeguarding the legitimate employment rights of civilians called to active duty does not include offering overlapping benefits.

7. ...WHERE THERE IS NO PRACTICE/AGREEMENT IN EFFECT

a. Cost to Employee: VVA prefers the House position, providing that employees may be required to pay only the actual of the cost of a benefit. The Senate bill, modelled after COBRA, plans to pass administrative costs to the employee. VVA believes that is unfair.

b. Period of Continued Coverage: VVA supports the House version with its clear coverage of up to 18 months. Military service, even when it does not involve participation in combat or other disasters, is a jarring transition from civilian life. Allowing coverage of employer-sponsored insurance for a fixed period, rather than duration of service when it is the shorter period, will in some cases provide the employee additional time for personal adjustment. That is in everybody's best interest.

c. Exclusion or Waiting Period for Health Benefits: VVA supports the Senate bill, which would maintain coverage that would have existed had there been no interruption of employment. The House bill's provision for the imposition of a waiting period or exclusion should the VA determine that the employee's condition is service-connected places far too much faith in the accuracy and timeliness of VA determinations. Also, section 2316 (c)(1)(B) of the Senate bill is consistent with our position against overlapping coverage.

Even so, VVA wonders whether this determination can be made wisely before the enactment of nation health care reform. This area may be changed entirely by the outcome of that debate, calling for further change in this legislation.

8. PERIOD OF PROTECTION FROM DISCHARGE

VVA prefers the added protection of the Senate bill for periods of less than 31 days of service. It gives an employment safeguard in short-term cases that ought to be the easiest to protect, and it covers the employee during the period when the readjustment may most likely be difficult.

Military service, even when it does not involve combat, can be wrenching. A woman who is normally a data processor with a daily routine organized around her job and family suddenly finds herself operating radar devices in the desert for three weeks, and spends most of that time wearing chemical protective suits and planning how she can call her husband and two children to tell them she hasn't been hit by a SCUD missile. She gets a long flight home, a weekend with the kids, and then goes back to work. If her mind is sometimes ten thousand miles away—or wishing she had some time at home—

during that first month, it doesn't mean she's being irresponsible. And this may be even more true of an attack helicopter pilot. This is a place to show some patience.

9. USE OF CIVILIAN LEAVE

VVA prefers the House bill's additional provisions regarding civilian leave. We see no reason for employees to forfeit sick leave, personal days, or other forms of leave beyond vacation/annual leave as a penalty for active duty service, nor do we understand why the employee would need to request retention of such leave. However, VVA agrees with the Senate that temporary positions should not be exempted from such coverage.

10. MULTIEMPLOYER PENSION BENEFIT PLANS

VVA supports the Senate version, which seems to us to fix the responsibility more clearly. This should benefit everybody. The House version does not spell out which of perhaps several employers bears liability, which could lead to messy and unnecessary litigation.

11. Pension Benefit Plan Contributions

a. Limitation of Contribution Amount: VVA supports the Senate position with regard to employers. Our decision rule in favor of employment safeguards does not require visiting an administrative nightmare on employers, nor giving employees unearned interest on money they were unable to invest in a pension fund. Balancing the limitations on employee and employer contributions seems to VVA to make sense.

b. Elements of Employer Contribution: VVA supports the Senate bill's more straightforward system of computation. As we just stated, our objective in this legislation is to safeguard jobs for employees called to service, not to guarantee every detail of their income. Requiring employers to make voluntary contributions and to compute detailed hypothetical earnings is unreasonable.

c. Period for Making Retroactive Contributions: VVA prefers the Senate bill's guarantee that the employee not be afforded a shorter payment period than the length of absence. To allow otherwise would put a hardship on the employee that bears no relationship to military pay scales. In most cases, the employee will have made less money during the absence, thus finding it harder to pay retroactive payments.

d. Computation of Liability and Payments: VVA supports the Senate version, tying employer liability to what it would have been without an interruption in employment. The House version gives the employer a savings out of the pension fund of the employee who serves his or her country in time of need. That is not just.

12. PENSION BENEFIT PROTECTIONS

VVA backs the Senate bill here, protecting all parties against adverse consequences under the Internal Revenue Code. Crises that require the call-up of citizen-soldiers should not be revenue enhancing devices for the federal government.

13. ENFORCEMENT OF RIGHTS

VVA supports the Senate version. If the Secretary of Labor fails to secure voluntary compliance with the act, the Secretary is required to inform the employee of results of investigation and entitlement to proceed. This is information that the complainant needs, and it is gathered at the expense of taxpayers, including the employee. Why wouldn't the complainant be informed?

14. VENUE

VVA supports the Senate bill specifying venue. Wherever issues may be made clear in advance of litigation, it is useful to do so. This is an added protection for all parties, and should cut down on legal costs for everybody.

15. OFFICE OF SPECIAL COUNSEL

VVA prefers the Senate provision allowing representation by the Special Counsel. This additional protection recognizes the range of employees subject to active duty service, and extends a useful coverage.

16. MSPB AWARD

VVA supports the Senate bill's provision allowing the Merit Systems Protective Board (MSPB) to cover litigation expenses for the employee. However, we think limiting MSPB award authority to federal executive agencies is too narrow, and serves no legitimate interest. If the federal government is to be a model employer—and if simple justice is to be served—the legislative and judicial branches must offer the same protections.

17. SUBPOENAS

VVA supports the Senate bill. Exempting the federal government from subpoena authority—or any other provision of the law—runs counter to the goal of the federal government being a model employer.

18. REGULATIONS

VVA prefers the House bill. Allowing the federal government to give employees greater or additional rights furthers the goal of the Federal Government being a model employer.

19. REPORTS

VVA supports the House bill's requirement for annual reports. The area of reemployment rights is complex, and whatever the outcome of this legislation, it will not wrap up everything in a neat package. Encouraging ongoing evaluation is a realistic step.

20. REVISION OF FEDERAL RETIREMENT BENEFIT

VVA has no position on this section.

21. EFFECTIVE DATES

VVA supports the Senate bill, making provisions of the 1993 Veterans Reemployment Rights Act inclusive of those who were called to active duty for Operations Desert Shield and Desert Storm. To

exclude these men and women who were required to take part in the most massive military deployment since Vietnam would violate our own standards of support for ensuing generations of veterans, and it would be both a grave injustice and an unwise step in view of the state of our economy. If the Persian Gulf episode is to serve as a model for future military actions, it must also serve as a model for how we treat our veterans.

CONCLUSION

Mr. Chairman, how fairly we treat those Americans who serve in time of crisis is always an indicator of how serious this country is about investing in its future. If public and private sector employers are willing to scrap *any* group of employees simply because it is more convenient to replace them and keep moving, those employers have no long-term vision. In particular, the care and retention of a diverse category of employees who are attuned to discipline and the public good is a solid, practical investment in the future.

The reforms we have endorsed treat both national security and our nation's workforce as long-term investments. We thank you for this opportunity to present our recommendations.

WRITTEN RESPONSES AND ADDITIONAL INFORMATION FROM THE DEPARTMENT OF LABOR

U.S. Department of Labor

JUL 1 1

The Honorable John D. Rockefeller
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On May 13, I testified before the Senate Veterans' Affairs Committee on the Uniformed Services Employment and Reemployment Rights Act of 1993 (USERRA). During my testimony, I commented on the "furlough or leave of absence" provisions of the current Veterans' Reemployment Rights Law, in response to the Committee's questions concerning the treatment of individuals absent for military duty. The purpose of the enclosed document is to more fully explain servicemembers' entitlement to benefits while absent for military duty under current law.

Sincerely,

MARY PUENTE-DUANY
Director, Office of Veterans' Employment,
Reemployment and Training

Enclosure

Furlough/Leave of Absence

The Veterans' Reemployment Rights (VRR) Law requires that an individual returning from service:

> shall be considered as having been on a *furlough or leave of absence* during his period of training or service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees on *furlough or leave of absence* in effect with the employer at the time such person was inducted into such forces....
>
> 38 U.S.C. section 4021(b)(1)(A) (formerly section 2021(b)(1)(A)) (emphasis added).

As can be seen, current law contains two "furlough or leave of absence" clauses. The first clause establishes the principle that no break in employment or in continuity of employment may be held to have been caused by military absence. An individual returning from service is entitled to all perquisites of seniority which would have been received if the individual had not been absent for service, and which are rewards based on length of service rather than short term compensation for work performed. In determining whether a benefit is a perquisite of seniority, the courts have considered the actual practice of the employer, rather than the employer's stated policy. Various courts have determined that the following are benefits of seniority: pensions, pay increases, severance pay, missed promotions, missed transfers, stock options, dislocation allowances, and retroactive seniority adjustments.

Various courts have also found that the returning servicemember is not entitled to benefits such as vacation, sick days, or profit sharing which have been determined to be short term compensation for work performed. The second "furlough or leave of absence" clause establishes an exception to this rule. Under this clause, returning servicemembers are entitled to non-seniority based benefits to the extent that these benefits are provided to other employees on furlough or non-military leaves of absence. This prohibits discrimination between returning servicemembers and other employees who return to work after other types of leaves of absence such as jury duty, disability leave, or maternity leave.

Benefits under the second "furlough or leave of absence" clause are in addition to, not instead of, seniority-based benefits, thus creating a floor for entitled benefits, especially when there is a lack of uniformity in an employer's dealings with employees on furlough or leave of absence. The clause does not create a windfall for the returning servicemember. The servicemember is not entitled to any benefit because of military service which would not have accrued had the servicemember remained on the job. Thus, the clause requires that an employer provide the most favorable treatment to a returning servicemember that the employer provides to other employees on furlough or leave of absence who work in positions similar to that of the servicemember.

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

JUL 15 1993

The Honorable John D. Rockefeller IV
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In our testimony before your committee concerning the Uniformed Services Employment and Reemployment Rights Act of 1993 (USERRA), S. 843, the Department of Labor reserved its comments on the health care and pension provisions. This letter sets forth the Department's views on these matters.

We support the passage of the health care provisions of S. 843, with the following suggested improvement. Section 4316(c)(1)(C), pertaining to the continuation of employer sponsored health insurance for an individual absent because of service, has the effect of terminating the continued employer-sponsored health plan at the same time as any government sponsored health plan would end, without taking into consideration the period of time the individual is afforded under the bill to return to the preservice employer. Therefore, we request that Section 4316(c)(1)(C) be amended to read:

> "(C) The period of coverage of a person and the person's dependents under a continuation of health-plan coverage elected by the person under this paragraph shall be the lesser of--
>
> "(i) 18 months;
>
> "(ii) the period of the person's service in the uniformed services, and any additional period following such service until such person is reinstated to employment; or
>
> "(iii) the period during which the employer provides any employer-sponsored health-plan coverage to any employee."

This provision, as amended, would eliminate a potential gap in health insurance coverage for a returning servicemember between the time of the servicemember's discharge from the service and reinstatement to employment which has health plan coverage.

We would also suggest that the provision pertaining to continuation of health insurance be amended to specifically include continued coverage for "dependents." Although Sections 4316(c)(1)(C) and 4316(c)(2) explicitly provide for such

coverage, Sections 4316(c)(1)(A) and (1)(B) do not address this matter. Language should be added to these sections providing such coverage to eliminate any ambiguity.

Our assessment of the impact of the pension provisions of S. 843 and the number of returning servicemembers potentially entitled to participate in defined contribution plans has been completed. The assessment indicates that generally there is a small percentage of servicemembers eligible to receive employer contributions and a reasonable cost for the employer per servicemember. Accordingly, we support the pension provisions, with the following recommended changes.

Regarding employee pension benefit plans, Section 4317(b)(4)(B) has the possible effect of excusing the employer from making any contribution to the returning servicemember's pension plan except those contributions mandated by the plan or the collective bargaining agreement. That section should be amended to make clear that the employer must make all contributions to the returning servicemember's pension plan, regardless of whether such contributions were mandatory or elective. To accomplish this, we therefore request that the words "any elective employer contributions, or" be stricken, from Section 4317(b)(4)(B), which would then read as follows:

> "(B) any forfeitures during the period described in subsection (a)(2)(B) shall not be allocated to persons reemployed under this chapter."

Section 4317(d)(2) of the bill provides that the pension provisions of the bill shall not apply to the extent they require contributions to be returned, or additional contributions to be made, with respect to non-veteran employees. This language does not make clear that employers may not reallocate assets from the accounts of non-veterans in order to achieve the required benefit accruals for reemployed veterans. This paragraph should be amended to read as follows:

> "(2) requires contributions to be returned or reallocated, or additional contributions to be made, with respect to employees not reemployed under this chapter."

S. 843 would be subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. The preliminary estimate is that the pay-as-you-go cost is zero.

I appreciate the hard work of your committee in attempting to structure this bill in a manner to serve the needs of the Nation while protecting the rights of the servicemember without being unduly burdensome upon the employers of the Nation.

The Office of Management and Budget advises that there is no objection to the submission of this report to Congress from the standpoint of the President's program.

Sincerely,

Robert B. Reich

WRITTEN RESPONSES AND ADDITIONAL INFORMATION FROM THE AMERICAN LEGION

SURVEY OF CORPORATE TREATMENT
OF
MEMBERS OF THE NATIONAL GUARD
AND
ARMED FORCES RESERVES

APRIL 12, 1991

METHODOLOGY

A letter from the National Commander of The American Legion was sent to the chief executive officer of each of the companies named in the FORTUNE magazine list of the nations top one-thousand companies. The same letter was sent to the next one-thousand companies in descending order of total revenue. Attached to the letter was a survey form asking several questions regarding the policies of the company regarding the treatment of members of the National Guard and armed forces Reserves who were called to active duty during Operation Desert Shield/Desert Storm. Copies of the survey letter and the survey form are at Attachments 1 and 2.

Based on envelopes returned, it is assumed that 1,950 survey forms were delivered. A total of 356 completed forms or 18.3% of those assumed delivered were returned. No forms returned after April 5, 1991, were tabulated in order to facilitate the availability of this report. Survey forms were divided by company size and tabulated in order to determine whether company size influenced the treatment of reservists.

RESULTS

It is apparent from Figure 1 that the majority of the corporations responding to the survey are going beyond the requirements of Title 38 USC in attempting to treat their employees who are members of the armed forces Reserves and National Guard in a fair manner. More than two thirds of the responses were from companies which continued to allow employees to accrue sick and vacation leave while on active duty. Similarly, more than 61% said they were making up the difference between the salary paid while on active duty with the military and what the employee would have earned at the regular place of employment.

Companies per Benefit By Time Period

CORPORATE BENEFITS	1 MONTH	3 MONTHS	6 MONTHS	1 YEAR	>1 YEAR	TOTAL
Continue Regular Wage/Salary	19	4	5	1	13	42
Make Up Wage/Salary Difference	18	16	28	20	215	297
Continue Health/Life (No Cost to Employee)	8	8	13	4	74	107
Continue Health/Life (Employee Pays Reduced Premium)	0	1	2	2	24	29
Continue Health/Life (Employee Pays Regular Premium)	7	9	10	8	193	227
Continue Accrual of Vacation/Sick Leave	1	3	3	1	239	247
Provide COLA Increases For Active Duty Employees	0	0	0	1	46	47

Figure 1

The survey also shows that major corporations are not the source of most of the reservists and members of the National Guard who were called to active duty. The 356 companies responding to the survey employ at least 3.2 million people yet reported only 9,979 or just over .3% were called to active duty during Desert Shield/Desert Storm. The number of Reserve and National Guard members called to active duty is in excess of 238,000. Thus, 4.2% of those called to active duty as members of the National Guard or Reserve forces came from the large companies who responded to the survey. While a survey of small companies and small business was beyond the scope of this project, one cannot help but wonder whether the majority of those called came from small business, and what the effect on those businesses has been.

Comparison of Benefits By Company Size

CORPORATE BENEFITS	0-1K (n=29)	1-5K (n=96)	5-10K (n=62)	10-15K (n=44)	15-20K (n=22)	>20K (n=101)
Continue Regular Wage/Salary	8.90%	2%	4.80%	4.60%	0	4.00%
Make Up Wage/Salary Difference	34.50%	62.50%	64.50%	59.90%	81.80%	60.40%
Continue Health/Life (No Cost to Employee)	13.80%	17.70%	20.90%	29.60%	13.60%	23.80%
Continue Health/Life (Employee Pays Reduced Premium)	3.40%	7.30%	8%	6.80%	9.10%	5.90%
Continue Health/Life (Employee Pays Regular Premium)	31.03%	51%	62.90%	54.60%	63.60%	57.40%
Continue Accrual of Vacation/Sick Leave	65.50%	63.50%	69.40%	79.60%	68.20%	65.40%
Provide COLA Increases For Active Duty Employees	20.70%	8.33%	9.60%	27.30%	4.50%	12.90%

Figure 2 (n= number of companies)

In the above chart (Figure 2) it can be readily seen that there is no significant difference between the benefits provided by companies of different sizes. (It should be noted that for companies in the 0-1000 employee range, and the 15-20,000 employee range, the sample sizes are small enough to make suspect any conclusions and/or comparisons with larger sample sizes.)

CONCLUSIONS

Corporate America seems to be doing its part to ensure that members of the Armed Forces Reserves and National Guard are able to maintain a viable lifestyle for their families while they are away. There are undoubtedly some companies which will attempt to exploit the call-up of their employees by cutting their positions and care must be taken to insure that the veterans involved are aware of their rights, and that the companies involved are aware of their responsibilities under the law.

The great unanswered questions concern the members of the Reserve and National Guard who either work for small business or perhaps own a small business. For owners, the Small Business Administration Office of Veterans Affairs has designated a special telephone number to call for information on revitalizing a small business.

RECOMMENDATIONS

The American Legion should pursue several initiatives to ensure that returning service people, especially members of the National Guard and Armed Forces Reserves, are able to return to their jobs when they are ultimately released from active duty The following recommendations are made with this goal in mind:

1. The Veterans Reemployment Rights statute (Chapt. 43, Title 38, USC) should be updated to make it more enforceable. Most of what is now being enforced is case law developed over a long period of time in the courts. This effort is ongoing and should continue.

2. Funding for the staff of the Veterans Employment and Training Service at the Department of Labor should be maintained at current levels at a bare minimum. The FTEE authorization for FY 1991 and FY 1992 is 288 employees nationwide. While there is some doubt that the staff size is adequate to meet the potential VRR needs, fewer FTEE will surely not be adequate.

3. Monitoring of the Small Business Administration Office of Veterans Affairs should be continued to ensure that the needs of small business owners who were called to active duty are properly served.

4. It is probably inevitable that some people called to active duty will not be able to return to previously held positions. For this reason, the portion of the employment services in the various states dedicated to veterans services must be funded at adequate levels. Ensuring that appropriations are adequate to accomplish this is an ongoing effort of the Economic and Legislative staff.

5. The companies in attachments 3 and 4 of this document must be recognized by The American Legion. these are the companies which met or exceeded the standard of performance set by The American Legion in dealing with employees called to active duty. Recognition should be by letter from the National Commander, through an article in The American Legion Magazine, and by news release in ALNS. Coordination between the Economics Division, the Magazine Division and the Public Relations Division is ongoing to implement this recommendation.

Companies Whose Desert Storm Benefits Match The Legion's

Home Savings of America
Irwindale, CA

Florida Power and Light
Juno Beach, FL

United Services Auto Assoc.
San Antonio, TX

Rohr Industries, Inc.
Chula Vista, CA

Phillips Petroleum Company
Bartlesville, OK

Amoco Corporation
Chicago, IL

United Telecom/US Sprint
Westwood, KS

The Great A&P Tea Company, Inc.
Montvale, NJ

Northwestern Mutual Life Ins. Co.
Milwaukee, WI

Quantum Chemical Corporation
New York, NY

The Torrington Company
Torrington, CT

Rohm and Haas Co.
Philadelphia, PA

Shell Oil Company
Houston, TX

Pacific Telesis Group
San Francisco, CA

E.I. du Pont de Nemours & Co., Inc.
Wilmington, DE

Humana Inc.
Louisville, KY

American Stores Company
Salt Lake City, UT

Sears Roebuck & Co.
Chicago, IL

Firms which grant merit raises instead of cost-of-living increases to their activated reservists/guardsmen are included here.

Companies Whose Benefits Are Superior To The Legion's

The Upjohn Company
Kalamazoo, MI

Matsushita Elec. Corp. of America
Secaucus, NJ

Northeast Utilities
Hartford, CT

New York Telephone/NYNEX
New York, NY

Bethlehem Steel Corporation
Bethlehem, PA

Merck & Co. Inc.
Rahway, NJ

Mercantile Bancorporation Inc.
St. Louis, MO

Degussa Corporation
Ridgefield Park, NJ

Columbia Savings Bank SLA
Fair Lawn, NJ

Beneficial Corporation
Peapack, NJ

The Walt Disney Company
Burbank, CA

Champion Spark Plug Co.
Toledo, OH

Mobil Corporation
Fairfax, VA

The Boeing Company
Seattle, WA

Columbia Gas Transmission Corporation
Charleston, WV

The Turner Corporation
New York, NY

Chrysler Capital Corporation
Stamford, CT

BASF Corporation
Clifton, NJ

Companies

O

BOSTON PUBLIC LIBRARY
3 9999 05983 239 2

ISBN 0-16-046177-4